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THE
Common Law Procedure Act,
1860.

BY JAMES STEPHEN, ESQ.,
EDITOR OF "LUSH'S PRACTICE," &c.

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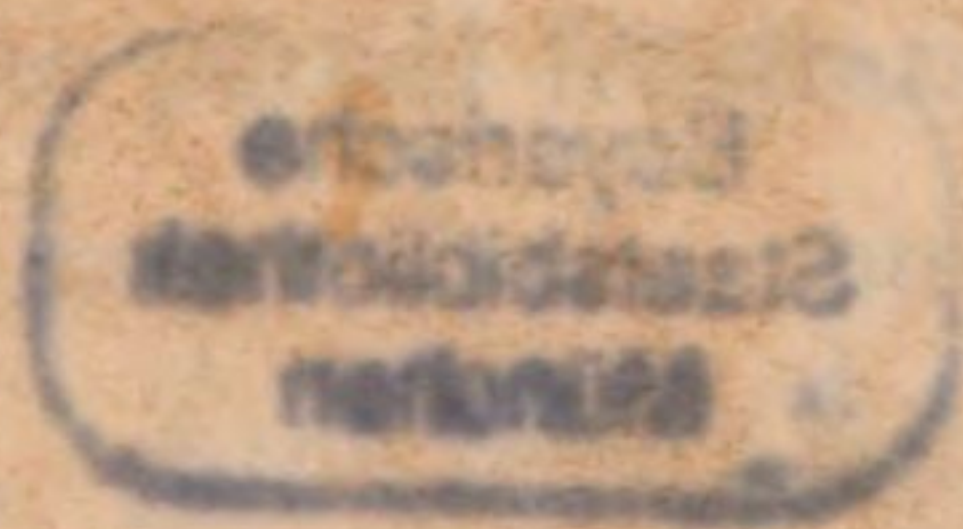
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THE
COMMON LAW PROCEDURE ACT,
1860,
(23 & 24 VICT. c. 126,)

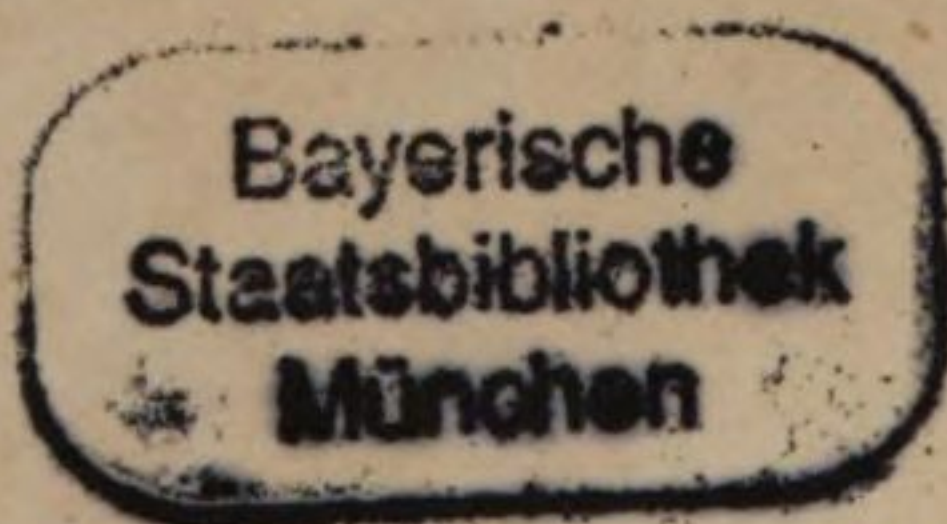
WITH
PRACTICAL NOTES:

AND
An Introduction,
EXPLANATORY OF THE NEW EQUITABLE POWERS CONFERRED ON THE COURTS OF
LAW; AND OF THE ALTERATIONS IN PROCEDURE AND PRACTICE
EFFECTED BY THE STATUTE.

BY
JAMES STEPHEN, Esq., LL.D.,
RECORDER OF POOLE;
EDITOR OF LUSH'S COMMON LAW PRACTICE, &c., &c.



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PREFACE.

THE Common Law Procedure Act, 1860, though it contains fewer provisions than either of its predecessors, is of considerable importance to the Practitioner. For it is the concluding link of the series of recent reforms carried into effect on the recommendations of the Commissioners appointed in the year 1850; and forms a material instalment of the general system of Common Law Practice, so far as it can be expressed by Legislative enactment.

The present Statute is also interesting as the recorded result of a great effort on behalf of the Courts of Common Law to extend their Equitable powers and of the partial frustration of that effort. But this conflict can only be considered as temporarily suspended, by the recent triumph achieved by the Memorialists against the final Report of the Common Law Commissioners. And for this reason, as well as because of the intrinsic interest of the

questions at issue, I have thought it right to state at some length in the Introduction the precise nature of the differences of opinion which prevail on this subject between these high authorities.

In the belief that this Edition of the new Procedure Act may be conveniently used as supplementary to my edition of Mr. Lush's Common Law Practice, I have frequently, in the Notes, referred to the pages of that Work, in order to afford the reader the means of seeking there fuller information upon the different subjects mentioned in, or connected with, the Act.

J. S.

2, BRICK COURT, TEMPLE,

3rd November, 1860.

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THE
COMMON LAW PROCEDURE ACT,
1860.

INTRODUCTION.

CHAPTER I.

OF THE COMMON LAW COMMISSION, 1850, AND OF ITS
SEVERAL REPORTS.

THE Common Law Commission, whose labours have just terminated, was appointed in the year 1850, chiefly for the purpose of sifting, with a view to its reformation, the then existing "process, practice and system of pleading in the Superior Courts of Common Law at Westminster" (a). At that time a general and well-founded dissatisfaction prevailed amongst both practitioners and suitors with regard to the procedure of those Courts. It is true that the existing system, compared with that in use at a still earlier period, was deserving of great approval; for a previous Common Law Commission appointed in the year 1828,

*The Common
Law Commis-
sion.*

(a) The royal commission (dated 30th May, 1850) embraced other subjects also, viz.:—The manner of conducting suits and other proceedings in such Courts and on the circuits, and the costs, charges and expenses incident thereto; the practice at the judges' chambers, and the duties of the several officers, clerks and other persons of and connected with such Courts, circuits, and judges' chambers, their salaries, fees and emoluments.

had opened the path of reform: and, on their recommendations, most important alterations (including the abolition of a variety of cumbrous and unnecessary *real* actions) had been made by the legislature (*b*). But many and serious grievances still remained unredressed. It was among other complaints urged, that, while a very large majority of the suits commenced in the Courts were in practice undefended, the expense and delay in carrying them through to a termination was not proportionably diminished. It was also a subject of deep dissatisfaction, that through the medium of *special demurrers* formal objections to pleadings were constantly being raised, which (while they consumed the time of the judges and increased the expenses falling upon the litigants) were quite beside the real merits of the matter in controversy.

First Report.

To provide a remedy for these acknowledged evils was the first object of the commissioners, and in June, 1851, they presented their First Report, which contained a variety of suggestions for the effectual reform of the process, practice and system of pleading in the Superior Courts of Common Law (*c*).

It was in consequence of this Report that the Common Law Procedure Act, 1852, was enacted, and that statute was followed in Hilary Term, 1853, by general pleading and practice rules of Court in substitution for those which were previously in force, and which, from that date, were abolished.

Second Report.

In April, 1853, the commissioners presented a Second Report, in which they discussed a variety of important topics which were either supplementary to their First Report, or had been reserved for further consideration.

Among the subjects handled in this Second Report, was one which has long been a favourite theme for speculation

(*b*) See, in particular, 2 Will. 4, c. 39, and 3 & 4 Will. 4, cc. 27, 42.

(*c*) This Report also comprised suggestions with regard to the ministerial functions of these Courts, and as to the payment of their officers by salaries instead of fees. Most of these recommendations were adopted by the legislature in the Nisi Prius Officers' Act, 1852 (15 & 16 Vict. c. 73).

among law reformers; namely, the improvement of the existing relations between the Courts of Law and the Court of Chancery. In popular language, this is known as the "fusion of law and equity," and in the Report in question the commissioners urged that, to a certain extent at least, it was desirable to break down the barriers which existed between the two systems of jurisprudence; and that, in particular, the procedure of the Courts of Law might with advantage be enlarged and expanded in two concurrent though distinct channels;—viz. 1, in such manner as to dispense with the assistance previously afforded to them by the Courts of Equity in the progress of an action—such aid being known as *auxiliary* or *assistant* equity; and 2, in such manner as to provide Courts of Law with certain powers similar to and co-extensive with those previously enjoyed exclusively by the Courts of Equity, for the protection of *legal* rights and the enforcement of *legal* obligations.

This Report was followed by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), in which most of the suggestions of the commissioners for the further improvement in the procedure in an action were carried into effect, and in which also their recommendations with regard to conferring upon the Courts of Law equitable powers similar to those previously exercised exclusively by Courts of Equity were *partially* adopted.

A considerable time elapsed before the commissioners presented any further Report of their proceedings, or hazarded any additional recommendations. But early in the present year,—having by that time, as they remark, had some experience with regard to the new system of procedure,—they submitted to the royal consideration their Third and final Report. In this they again urged the expediency of most of their previous recommendations as to the fusion of law and equity which had been disregarded by the legislature, and even advanced fresh views in the same direction. They also made suggestions with regard to certain of the matters committed to them on which they

Third Report.

*History of the
Bill drawn up
on the Third
Report.*

had hitherto failed to report, or as to which they wished to add something to what they had already advised.

In accordance with the Report thus submitted, a bill was drawn up embodying the recommendations therein contained, and this was presented to the House of Lords by the Lord Chancellor, accompanied with the expression of his hearty approval. Before, however, the bill reached its second reading, a memorial against it (dated 22nd March, 1860) was submitted to the Crown, signed by certain of the equity judges (*d*), and this paper was laid by her Majesty before the House. In due course this memorial was answered by the Common Law Commissioners, in a counter-memorial dated the 18th May, 1860, and this document also was laid before the House of Lords. Finally, the original bill was remitted to a select committee, by whom it was returned in a state very different from that in which it had been sent up by its promoters. In its altered state, however, it became law, and forms the "Common Law Procedure Act, 1860."

In the following chapter the subject-matter of the Report will be divided so as to comprise the natural divisions of the new Procedure Act. It will thus more readily appear to what extent the parting advice of the commissioners has been followed, and in what respects the system of Common Law Procedure, as now established, is, in their judgment, still defective.

(*d*) Sir John Romilly, Sir John Stuart and Sir Page Wood.

CHAPTER II.

OF THE SUGGESTIONS IN THE THIRD REPORT WITH
REGARD TO THE FUSION OF LAW AND EQUITY.

As already noticed, this topic was not entered upon by the commissioners in their Third Report for the first time. At the outset of their labours, indeed, they wisely abstained from entering upon this well-contested field for discussion; and accordingly the First Report is entirely silent upon this subject. But in their Second Report the commissioners, having cleared their way by reforming the more glaring abuses in the procedure of actions, made the suggestions to which allusion was made in the last chapter for the extension of the *jurisdiction* of the Courts of Law, so as to embrace some of the powers hitherto exercised exclusively by the Court of Chancery, and some of these were adopted by the legislature.

With respect to some of the advice thus given, the present commissioners, it may be here remarked, had been anticipated by their predecessors of the former Law Commission, to which reference has been made; for they also, in their Second Report (pp. 20 to 23, and 70 to 73), made certain suggestions based upon the inadequacy of the then existing procedure and jurisdiction of the Courts of Law, which, at the time, failed in obtaining the attention they deserved.

In order, however, better to explain the scope of the suggestions for the fusion of law and equity made by the present commissioners in their Third Report, it will be proper shortly to mention some of the suggestions on the same subject they made in their previous Report, and to point out to what extent each of them was adopted by the legislature.

*Suggestions in
Second Report
for increase of
equitable
Powers.*

Among, then, the defects of the jurisdiction of the Common Law Courts exposed in the Second Report were, 1st, the insufficient powers of the Courts with regard to compelling the *discovery* of facts and documents; 2ndly, their insufficient powers with regard to *inspection*; and, 3rdly, their insufficient powers with regard to *execution*.

Now the suggestions made to supply the deficiencies in the procedure and jurisdiction of the Courts of Law on these three heads were fully carried out by the legislature, and resulted in those sections of the Common Law Procedure Act, 1854, which treat of Discovery and Interrogatories (17 & 18 *Vict. c.* 125, *ss.* 50—57), of Inspection of Real and Personal Property (*ib.* s. 58), and of Execution by Attachment of Debts and in Detinue (*ib.* *ss.* 60—67, 78). But the suggestions contained in the Second Report went much further than these:—"We think," said the commissioners, "we shall not outstep the limits of our commission by so far expressing our opinion, upon what is commonly called the 'fusion of law and equity,' as to say that it appears to us that the Courts of Common Law, to be able satisfactorily to administer justice, ought to possess in all matters within their jurisdiction the power to give all the redress necessary to protect and vindicate common law rights and to prevent wrongs, whether existing, or likely to happen unless prevented" (Second Report, p. 38). And, taking this proposition as their guide, the commissioners proceeded further to advise,—1. That the power of compelling, by means of a *mandamus*, specific performance of contracts, should be conferred upon Courts of Law in every case in which that relief was granted by Courts of Equity; 2. That there should be given to them the power of restraining, by an *injunction* claimed in an action, the actual or threatened violation of legal rights in those cases in which an injunction then issued for that purpose from the Courts of Equity; and 3. That Courts of Common Law should be empowered to receive *equitable* defences by way of plea in every case in which the party pleading them

would be entitled to unconditional relief by injunction from a Court of Equity; and that in cases where such relief in Courts of Equity would be conditional or discretionary, the Courts of Law should have power to give in a summary way the same relief against actions pending therein as might be obtained by resorting to a Court of Equity.

The advice, however, thus given was only very partially adopted by the legislature. It is true that the Common Law Procedure Act, 1854, contains provisions upon each of these three subjects, but they most materially fall short of what the commissioners recommended. With regard to the first suggestion, that Act (ss. 68—77) simplifies indeed the proceedings on the writ of mandamus, and allows it to be claimed from either of the Superior Courts of Law as part of the claim in any action therein brought, but nothing in these sections expressly extends the scope of this writ; and in one case it was held by the Queen's Bench that no duty could be thus enforced other than one which might be enforced by the prerogative writ of mandamus (*Benson v. Paull*, 6 Ell. & Bl. 373).

With regard to the second suggestion, the Act (ss. 79—82), though it allows the plaintiff in any action who has been *injured* by the breach of contract or other injury in respect of which he sues, to claim a writ of injunction against the repetition or continuance of the breach of contract or injury, or the committal of a breach or injury of a like kind arising out of the same contract or relating to the same property or right, carefully avoids conferring upon the Courts of Law any powers to grant such writs in respect of cases of *threatened* injury.

And, lastly, with regard to the third suggestion, the Act (ss. 83—86), though it amply carries into effect the recommendation as to equitable pleadings in cases where "relief against the judgment" would be granted by a Court of Equity, says nothing whatever with respect to those cases in which a conditional or temporary relief only

would be granted. And, accordingly, the Courts of Law have, in a host of decisions, thoroughly established the doctrine, that the Act applies only to cases where an *unconditional* and *permanent* injunction would be granted in equity against proceeding with the action or defence.

Such was the state of things at the time the commissioners presented their Third Report; and in this, undeterred by the degree of disregard which had already been paid to their advice, they substantially repeat and enforce it with additional arguments, introducing them with these prefatory words:—

“The experience of the five years which have elapsed since the passing of the Act of 1854 has strongly confirmed the views which we sought to enforce in our last Report; and we cannot but regret the partial manner in which our recommendations were carried into effect by the legislature.”

“Upon this subject, in addition to what was formerly urged, we beg to submit for consideration the following observations.”

Fresh Arguments in support of their Views adduced by the Commissioners.

The arguments urged by the commissioners, either in their Report or in the counter-memorial above mentioned, as supplementary to those originally set forth in their Second Report (which may be considered as having been dealt with and received their due weight in the Common Law Procedure Act, 1854), in support of their several suggestions for the improvement of the existing relations between the Courts of Law and Equity, may be thus arranged and epitomized.

1. *As to Injunctions against threatened Injuries, and to protect Property.*

The jurisdiction hitherto exclusively enjoyed by the Court of Chancery, with regard to protection against threatened and impending injury, deals to a great extent with subjects which are within the general jurisdiction of the Courts of Law,—it being, indeed, founded with the

express object of giving a more complete remedy, by restraining the commission of injuries in respect of which Courts of Law can only award damages. This branch of equitable jurisdiction naturally divides itself into injunctions against *threatened injuries* and injunctions with the object of *protecting property*. *Threatened Injuries.*

As to the first class, there seems no good cause why Courts of Law should *not* have power to protect legal rights from violation, as well as to punish their violation by awarding damages. Both compensation in damages and protection are often required in respect of the same outrage; and, in the latter case, the remedy can at present only be obtained by resorting to the Court of Chancery; since no application for a writ of injunction can be made to a Court of Law till after a wrongful act has actually been done and an action commenced,—a limitation of the writ and a duplication of suits which seem unreasonable on principle; for it is assumed that the right about to be violated exists at common law, and that, when violated, it will be redressed in the Common Law Court, and not in the Court of Chancery; indeed, the latter Court will often decline to interfere until after the right about to be infringed has been established at law.

It is particularly to be borne in mind, that it is not proposed to confer on the Courts of Law the power of issuing an injunction in the case of a threatened violation of a right, where the title to the property is complicated by *equitable* rights, but only where the right is strictly of a legal character. At present the anomalous character of our judicial system, in this respect, produces this absurd result;—that if one of 1,000 trees on an estate be wrongfully cut down, an injunction may be obtained from a Court of Law to prevent the cutting down of the remaining 999. But that, until one tree has been cut, he, whose rights are about to be certainly invaded, is unable to come to a Court of Law for protection of the one tree about to be sacrificed.

*Protection of
Property.*

As to the other class of injunctions—those, namely, which issue for the *protection of property*—it is only sought to confer on Courts of Law the right to issue them in those cases where the title to the property is in dispute and is the subject of litigation in such Courts—as in an action of ejectment or detinue. Such power ought certainly to exist somewhere, but under the present system the title to the property must be disputed in one Court, and its protection, till the right be determined, sought in another; a rule which results in the necessity for two suits with two-fold expense, where one would otherwise suffice.

No provisions appear in the Act bearing upon these clauses of the Report.

2. *As to Orders to give up Documents.*

*Delivery up of
Documents.*

The power hitherto exclusively exercised by the Court of Chancery to order the delivery up for cancellation of documents which, upon the face of them, appear sufficient to give the *holder* a right of action at common law, but which, by reason of circumstances which might be set up as a defence if an action were brought, ought not to be made available, may well be given to Courts of Law in respect of common law claims and defences. The true foundation of such jurisdiction is the danger that, by lapse of time, evidence of the defence might be lost, and so the instrument be unjustly enforced. It is plain that this power, also, should exist somewhere, so as to protect a person so circumstanced from having such a danger hanging over his head for years. And there are these three reasons for vesting that power in the Courts of Law. 1. The documents would only be enforceable at law. 2. The matter of defence would be pleadable at law. 3. The Courts of Law could try the facts, if contested, better than the Court of Chancery.

The Act contains no provision upon this subject.

3. *As to Equitable Pleadings.*

Notwithstanding the Common Law Procedure Act, 1854, the law is still imperfect in the extent it allows, as a defence to an action, matter which is ground for application to the Court of Chancery to restrain the proceedings at law by injunction. *Equitable conditional Relief in Court of Law.*

Where the relief in Chancery would be unconditional and the injunction perpetual, the matter may, it is true, now be pleaded in bar of the action; but the law Courts ought to have also power to give relief, if not by plea, then in a summary way by rule of Court, where the Court of Chancery would only give conditional relief. The consequences of their not having such power is to drive the defendant to the Court of Chancery, or else to lead him to submit to an adverse judgment at law, though he is ready and willing to perform the conditions on which the Court of Chancery will relieve him from the effect of such judgment.

No real difficulty in conferring such powers on the Courts of Law exists by reason of the rigidity of the existing forms of pleading and judgment, or in reference to the appellate machinery which would be rendered necessary.

In an action brought upon a mortgage deed, the Courts of Law now stay proceedings, and compel a reconveyance upon payment of the debt and costs (*a*); which shows how easily effect could be given to a conditional equitable defence, either by means of a rule or order, or by way of plea; the form and effect of the judgment being, on the latter supposition, altered so as to give the combined effect of a common law judgment and a decree on a bill for relief; and on such a judgment error might be brought as on other judgments. And as to the mode of appeal from a rule or order of Court (if that procedure was adopted) it might be in the form of a "special case," stating the

(*a*) This equitable jurisdiction was given to the Courts of Law by 7 Geo. 2, c. 20.

facts necessary to raise the question; as in appeals, upon new trial motions under the Common Law Procedure Act, 1854. And to meet exceptional cases of great difficulty, the Courts of Law might be enabled to "reject the defence," as provided by the 86th section of that Act with regard to the equitable defences at present allowed.

It may be further remarked, that if the performance of the condition can be insured, there is no conceivable reason why the defendant, who is willing to perform it, should be driven to the Court of Equity. And to doubt that the due and effectual performance of the condition which would be required at equity could be enforced by a Court of Law, is to doubt its competency to administer the law at all.

The Act contains no extension whatever of the existing powers with regard to equitable defences.

4. *As to Relief against Forfeiture.*

*Relief in cases
of Forfeiture.*

It often happens that contracts provide for a pecuniary penalty of large amount in case of non-payment of a smaller sum or non-performance of one or more stipulated acts, the omission of which occasions damage of less amount than the penalty. In most cases, at the common law, it was formerly competent for the stipulating party, in case of breach of the contract, to demand and recover the whole amount of the penalty, without regard to the actual amount of damage sustained. In the Court of Chancery, however, unless it appeared that the amount represented the agreed damages for a breach of contract, technically called "liquidated damages," the sum stipulated to be paid was considered merely a security for the actual damages sustained; and where those admitted of calculation that Court relieved against the penalty, upon compensation being made for such damage. This equitable jurisdiction has already been given to Courts of Common Law,—the unseemly conflict between the two tribunals being put an end to by the statutes 4 Anne, c. 16, s. 11, and 8 & 9 Will. 3,

c. 11, s. 8. No more than the actual damage sustained can now be recovered at law, and the interference of the Court of Chancery is therefore no longer necessary.

The Court of Chancery has also always exercised a similar jurisdiction, and upon the same grounds, to relieve against the forfeiture of leases for *non-payment of rent*: and here again the legislature has to a certain extent conferred the jurisdiction of the Court of Chancery upon the Courts of Law, namely, by 4 Geo. 2, c. 28, ss. 2, 3, 4, and 15 & 16 Vict. c. 76, ss. 210, 211, 212. But a similar jurisdiction has been very recently conferred by statute on the Courts of Equity (namely, by 22 & 23 Vict. c. 35), so as to enable those Courts to relieve against the consequences of failing to *insure against loss or damage by fire*. And there is no reason why the jurisdiction of the Courts of Law should not also be extended in this direction; and it is right that on ejectment brought for a forfeiture those Courts should have, upon rule or summons, power to relieve in all cases in which relief can now be obtained by bill in Chancery.

It is further to be observed, that by the statute 4 Geo. 2, c. 28, relief in case of non-payment of rent may be obtained in *equity* for a period of six months after execution in the action of ejectment. In the Court of Law, on the other hand, the relief can only be granted up to the time of trial. There can be no good reason why there should be this distinction, or why the tenant, after having been evicted at law, should then be obliged to take out proceedings for relief in equity.

Such was the prayer of the commissioners with regard to this subject, and here for the first time we find in the statute answering provisions. These form the subject of the first eleven sections of the new Act, the general effect of which is, 1, that in any ejectment brought for a forfeiture *by reason of the non-payment of rent* the Court or a judge may give relief (upon rule or summons) in a summary way and without any fresh lease being requisite, subject, however, to the terms and conditions in all respects as to

payment of rent, costs and otherwise as would be imposed by the Court of Chancery upon a bill for relief (sect. 1); and 2, that in case of any ejectment for a forfeiture *by reason of the breach of a covenant or condition to insure against loss or damage by fire* the Court or judge may grant relief summarily in like manner and on such terms as would be imposed in Chancery, in all cases in which relief in Chancery may now be obtained under 22 & 23 Vict. c. 35. (Sect. 2.)

An appeal however is provided in both cases, *up to and within the like time after execution executed as would be allowed by the Court of Chancery*, from the decision of a judge to the full Court (sect. 4), and from the decision of the Court to the ordinary Courts of Error (sect. 6), in the form of a case stated (sect. 9). The Court of Appeal has moreover the power to give such judgment or make such rule as ought to have been had in the Court below, or to remit the cause, with such directions as they may think proper (sect. 10), and also to adjudge costs and to order restitution. (Sect. 11.)

5. *As to Restraint against Proceedings in Equity.*

Equitable Defence to Action not to be resorted to in Chancery.

The power to relieve against forfeitures given to Courts of Law will not be thoroughly effectual if the defendant is to be allowed, as at present, to leave the Court in which an action against him is pending for breach of covenant and apply for relief to the Court of Chancery. This should only be allowed when the Court of Law has rejected his application for relief on the ground that "it cannot be dealt with there so as to do justice between the parties." In the present state of the law a defendant, after allowing the action to proceed to its termination without applying for relief, may file a bill in Chancery founded on the same matter, and, after a second investigation of the case, nullify the judgment obtained at law. [See *Prothero v. Phelps*, 26 L. J. (Ch.) 105; *Kingsford v. Swinford*, 5 Jur. (N. S.) 761; *Gompertz v. Pooley*, 32 L. T. 367, and *Wild v. Hillas*, 4 Jur. (N. S.) 1166.]

Now it is to be observed, that, in actions on a right of re-entry accrued by a forfeiture, the *plaintiff* has no choice of tribunal; and he therefore ought not to be dragged before another Court at the option of the defendant, and, supposing the equitable right ultimately to prevail over the legal, to lose all the fruits of an expensive action. Moreover, it seems repugnant to justice that a party should be enabled to fight out his cause with his adversary on one stage, and having there taken his chance of success, to be at liberty, when defeated, to renew the conflict on a different ground, which had it been taken at first would have shortened the contest; and if such subsequent proceedings in equity ultimately prove unsuccessful, then the plaintiff is improperly delayed in proceeding on the judgment at law. Hence a party omitting to take his stand on equitable grounds, which it was competent to him to bring forward in the action, ought not to be allowed afterwards to harass his opponent by a renewal of the litigation by proceedings in a Court of Equity.

The Act contains no provision with regard to the grievance alleged in the above observations.

6. *As to Abolition of "Bills for a New Trial."*

The Court of Chancery is said to possess a jurisdiction by means of a "Bill for a New Trial" to restrain execution upon a verdict and judgment in an action at law after the time for moving for a new trial in the Court of Law has elapsed. This species of interference is mischievous in principle, as tending to revive and continue a litigation already brought to a close in a Court of competent jurisdiction; and therefore, though such bills have fallen into desuetude, they ought to be abolished by express enactment. It is to be observed, that ample time is at present allowed in the Courts of Law after verdict for bringing forward any grounds which may exist or supervene for a fresh trial; but if that time is too short, the proper remedy is to extend it, not to suffer the interference of another

Bills for a new Trial should be expressly abolished.

Court with no appellate jurisdiction over the Court in which the verdict was obtained. This proceeding by way of bill for a new trial upon a judgment in a Court of Law is stated to lie whenever a bill of review may be brought in respect of a suit in equity. (See Mitford on Eq. Pl. by Jeremy, p. 131, and Story on Equity, ss. 887, 888.)

No notice in the Act is taken of "Bills for a New Trial."

7. *As to Equitable Claims in cases of Interpleader.*

*Equitable
Claims in Inter-
pleader.*

The principle of interpleader is this:—That a person having, without any fault on his part, the possession of property in which he claims no interest and which is claimed by two or more other persons, is entitled to be protected from the necessity of litigating the question of property in which he has no concern, upon giving up the subject-matter in dispute to the proper authority. By 1 & 2 Will. 4, c. 58, the Common Law Courts were made the proper tribunals to receive such property and to determine between the claimants thereto. The jurisdiction thus conferred upon the Common Law Courts has proved highly beneficial; but as it exists at present the Courts cannot interfere where either or both of the claims set up to the property is *equitable*, and capable therefore of being enforced only in the Court of Chancery. Yet, whenever an action has been brought against the innocent holder of property claimed by different parties, the Court in which such action is brought, in order to do complete justice, ought to be enabled to adjudicate on all claims, whether legal or equitable, set up to the property in dispute,—or if the proceedings be taken by a sheriff, to decide upon the claim or claims set up as against the execution creditor, though such claim or claims be all equitable. In other words, the jurisdiction conferred by the statute on the Courts of Law ought to attach, whether the *jus tertii* set up be founded on legal or on equitable right. An innocent party placed between two fires ought in justice to be equally relieved from both, and the institution of fresh pro-

ceedings in equity is of course productive of great additional expense and delay to the other claimant. The object ought to be to place the case on such a footing that the interpleader shall become a litigious proceeding between parties really interested; and if the action *were* between the real parties,—as, for instance, between an execution creditor (on a seizure of goods by a sheriff) and a party setting up an adverse claim,—instead of between the claimant and the sheriff, an equitable right of the claimant would under the present law be available to him against the plaintiff, under an equitable plea to the action, without having recourse to a Court of Equity. Moreover, the *jus tertii* is very generally set up on the seizure of goods by sheriffs in execution of common law process; and yet Courts of Equity are not disposed to relieve sheriffs thus restricted (see *Tufton v. Harding*, L. T. R., 1 N. S. 264), while, on the other hand, they are liable to be sued at law if they omit to act under the writ of execution.

No notice in the Act is taken of the suggestion of the commissioners, that the Courts of Law in interpleader cases should be enabled to adjudicate on equitable as well as legal claims. Other suggestions, however, of the commissioners for the improvement of the law and practice of interpleader were approved of and form part of the Act, as will be explained hereafter.

The above may be taken as being substantially the chief reasons urged by the commissioners in support of the several suggestions contained in their Third Report, for improving the existing relations between the Courts of Law and Equity. The arguments on the other side, which appeared to the select committee sufficiently powerful to justify the rejection of the greater number of these suggestions, cannot be given with any degree of certainty, as no public discussion upon the subject took place in either

As to the Arguments of the Memorialists.

House; none, at least, which throws any great light upon the questions of expediency raised by the commissioners. It may however be assumed that the Memorial above referred to, submitted to the Crown by certain of the equity judges, had considerable weight; and from this document it may be collected that the chief grounds of opposition to this portion of the Report of the Common Law Commissioners are as follows:—

1. Although the general expediency of rendering the Court in which a litigation of any kind is commenced competent to the determination of all questions whose solution is necessary, in order that complete justice may be done between the litigants, so far as the same can be “satisfactorily” done, is admitted,—yet the principle upon which the Report proceeds to attempt this task is essentially erroneous. For,

2. So long as the distinction between legal and equitable interests exists, so long will two different courses of procedure be required. At present the mode of procedure appointed for the case of an equitable interest can only be had in Chancery; and yet the Report would allow a person with a legal but inequitable title to carry on proceedings at law, and thereby withdraw the equitable side of the question (the only matter probably in real dispute) from the consideration of those Courts who alone possess the proper procedure. Again,

3. In order “satisfactorily” to confer upon Courts of Law powers enabling them to do complete justice between litigants, without regard to the distinction between legal and equitable interests, it would, for the reason last mentioned, be necessary to remodel entirely its procedure and administration; to reconstitute, in other words, the Equity side of the Court of Exchequer. Any attempt to do so, however, with the existing machinery would only create confusion, from the probably conflicting decisions of Courts of Law and Equity on the same class of questions. There

would also result injustice to the defendant at law, in subjecting his rights, without his consent, to the operation of an imperfectly constituted tribunal; and in the greater number of cases double vexation, after much useless delay and expense, would be a third consequence. But,

4. A Court of Law can only summon before it the actual litigants, while a Court of Equity convenes all persons interested in the question raised. Hence, if the Court of Law were to assume equitable functions, a different decision might be there had with respect to an equitable matter, from what would afterwards be held in the Court of Chancery on a bill there filed by one of the absent parties. Hence,

5. The utmost extent of equitable jurisdiction which can be conveniently conferred upon Courts of Law is this: that whenever a case can be brought to a simple issue of law or fact between the parties to an action, then the Law Courts may decide that issue, whether it depend on legal or equitable title. This extent of jurisdiction has been already conferred upon them by allowing equitable pleadings; and where these have failed it has arisen from the inadequate machinery of those Courts to determine the right.

CHAPTER III.

OF THE SUGGESTIONS WITH REGARD TO INTERPLEADER PROCEEDINGS.

THE course of the Report and of the Act from this point will be found to be almost identical and in all respects consistent with each other. The next subject is "Interpleader," and on it suggestions are made by the Commissioners to the following effect:—

1. *As to Interpleader by Claimants.*

Titles of Interpleader Claimants may be different in origin.

In interpleader, after action brought by one of the claimants *against the holder of the property*, the Courts of Law (in the exercise of the jurisdiction conferred upon them by 1 & 2 Will. 4, c. 58) have usually followed the course of the decisions in chancery upon a "bill of interpleader," according to which no relief would be afforded when the titles of the claimants had not a common origin, but were adverse to and independent of one another. And yet this is not defensible on principle. A warehouseman, for example, who has occasion to seek relief against adverse claimants, is clearly entitled in point of justice to claim it, on handing over the property warehoused to be delivered to the proper owner, whatever the nature of that owner's title may happen to be.

This recommendation of the Report has been carried into effect in the Act by providing, that where application for relief has been made by any innocent holder of disputed property, under 1 & 2 Will. 4, c. 58, the Court or judge before whom the summons is pending may exercise all the powers and authorities in that behalf given to them by that statute in interpleader cases, though the titles of the claimants to the property in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another. (Sect. 12.)

2. *As to Interpleader by Sheriff.*

The difficulty above mentioned has no place in interpleader proceedings for the relief of *sheriffs* (in which case, as already observed, the Court of Chancery declines to interfere, and in respect of which therefore the Courts of Law are untrammelled by equity decisions) but with regard to this species of interpleader the Report observes, that it often happens that where a sheriff has seized goods in execution, a claim is made to them under a bill of sale for an amount much below their value, and where the goods if sold would be sufficient therefore to satisfy both the execution and the bill of sale creditor. In such a case, however, the sheriff has no power to sell; but the commissioners suggest, that where the claimant's right is only by way of security for a debt, the judge should have power to direct a sale and to apply the proceeds, in case of a surplus, to satisfy the execution, upon such terms as to payment of the secured debt and otherwise as he may think fit.

*As to Sale of
Goods seized
by Sheriff.*

This recommendation has been carried into effect by the 13th section of the Act.

3. *As to Summary Decision by Judge.*

It occasionally happens that the execution creditor and the claimant agree to leave the matter to the decision of the judge before whom an interpleader summons is heard, without requiring him to direct any issue; and when points of laws only are involved, this course evidently saves both expense and delay. But even where questions of facts only are involved (now that the parties and their witnesses can be summoned and examined before the judge), a similar saving would be effected, and accordingly the judge often, *by consent*, so disposes of the case. Sometimes, however, even in cases of small amounts, one of the parties vexatiously insists upon an issue being directed, though perhaps at a greater expense to both parties than

*Summary deci-
sion by Judge
in trying Inter-
pleader Cases.*

the whole amount in dispute. In cases of this kind, it is obviously for the advantage of all parties that the judge should have the power of overruling such obstinacy, and so preventing needless expense.

This power is accordingly given by the 14th section of the Act.

4. *As to a Special Case.*

*Special Case
where Law only
is involved.*

The commissioners further recommended, that in all cases of interpleader, without reference to the amount involved, provided the question were one solely of law (the facts not being disputed), the judge should be at liberty to decide the question without an issue; and, if necessary, to direct a special case for the opinion of the Court.

This recommendation is carried into effect in the 15th and following sections of the Act.

CHAPTER IV.

OF THE SUGGESTIONS WITH REGARD TO PROCEDURE AND PRACTICE.

THE sweeping and salutary changes in the procedure in actions at law which they had already advised in their First and Second Reports, and which were substantially carried into full effect by the legislature, certainly justified the commissioners in introducing, somewhat complacently, the further advice they were about to offer upon this subject. As regarded the amendments and alterations which had been already made, the commissioners were accordingly, "happy to be able to report that they had rendered the procedure simple, economical and speedy, and have had the effect of limiting the costs to the expenses of the necessary and essential steps in a cause. Moreover, the technicalities, which brought so much discredit on our jurisprudence, have now disappeared; and the Courts, owing to the improved system of pleading and procedure and the large additional power of amendment, are occupied in adjudicating upon the substantial merits of the cases in litigation, while, from the operation of the same causes, it very rarely occurs in trials at Nisi Prius, that the real question in controversy is not decided by the jury." (*Third Report*, p. 6.)

Some additional suggestions were, however, made as to pleading and procedure, and these shall now be considered separately.

1. *As to Joinder of Parties.*

This subject was discussed by the commissioners in their First Report, and the law which at that time existed was thus laid down.

Law as to Joinder prior to the Procedure Act, 1852.

“ In actions *on contract* the omission of a party as plaintiff who ought to be joined, or the joinder of a party who ought not to be joined, may be fatal to the action ; so the joinder of a person as defendant who ought not to be joined is likewise fatal ; while the omission of a party as defendant who ought to be joined can only be taken advantage of by a plea in abatement. In actions *of tort* a joinder of a party who ought not to be plaintiff is fatal, whilst the non-joinder of a party who ought to be a co-plaintiff can only be taken advantage of by a plea in abatement, and in such actions the joinder of persons who are not liable as defendants only entitles them to an acquittal, and the non-joinder of persons jointly liable is of no consequence.”
(*First Report*, p. 9.)

These rules, in the opinion of the commissioners, often tended to defeat justice, and they therefore in the first place proposed that the joinder of too many plaintiffs should not be fatal to any action (either of tort or contract), but that the plaintiff or plaintiffs entitled should recover. With a view however to guard against an abuse to which they foresaw that this change in the law might give rise, they also suggested that the defendant in an action in which there was more than a single plaintiff might succeed on a plea of set-off, by proving either that *all* the parties made plaintiffs were indebted to him, or that the plaintiff or plaintiffs who established their right to maintain the action was or were indebted to him. These suggestions, however, the legislature did not see fit to adopt ; though they gave effect to other suggestions made in the same Report with regard to the *amendment* of faults of non-joinder, and in so doing extended those powers of amendment to cases of *mis-joinder* also. And subject to these clauses for amendment, the law upon this subject has hitherto remained in the state in which it existed (as above described) prior to the Common Law Procedure Act, 1852. But in their Third Report the commissioners repeat their advice, with additional arguments. They point out that it often hap-

*Suggestions for
Change dis-
regarded.*

*Fresh Argu-
ments of Com-
missioners.*

pens that it is a doubtful question in whom is vested the right to sue, and that in such cases great hardship and difficulty are imposed upon the suitor by the rule which requires an action to be brought in the name only of the person in whom the right is legally vested. "The effect of that rule is, that a mistake as to the proper party to sue involves an expensive defeat, by a judgment whereby the right is pronounced to exist, but to be vested in a person not a party to the action, but who may in fact be a trustee for or otherwise in the same interest with the plaintiff, and who would have consented, had the law allowed him, to be joined as a party." (*Third Report*, p. 6.)

The commissioners proceeded to remark that the change had already been tested with satisfactory results in the action of ejectment, and that it was not likely that persons who had no interest in the matter in controversy would be joined as plaintiffs. Moreover, any possible danger of abuse would be sufficiently guarded against by giving the Court a discretion as to costs, and by the provision they had already recommended in their First Report with regard to set-off.

The suggestions of the commissioners on this subject are now carried into effect in the present Act (sects. 19, 20); but by way of additional precaution it is added, that no other action shall be brought against the defendant by any of the parties made plaintiffs (sect. 21). The meaning of this clause is, however, somewhat ambiguous. Is it intended that one who has a cause of action against another shall be altogether precluded from suing him thereon, in consequence of prior proceedings which have been brought against him by some one else (it may be without or even contrary to the consent of the party really entitled), but making such party nevertheless one of the plaintiffs? Such is the most obvious meaning of the clause, but if it is to be so taken it seems calculated to foster speculative if not fraudulent actions.

*Suggestions now
adopted.*

2. *As to Replevin.*

The Common Law Procedure Act, 1852, as regards Replevin.

The action of replevin was not handled in the Act of 1852 with sufficient distinctness. Some of the provisions of that Statute applied to that action by name (see, for example, s. 41), and many others by implication. (See ss. 81, 83, &c.)

New Enactments of 19 & 20 Vict. c. 108, with regard to Replevin.

But the definition of the word "action" given in the interpretation of terms section of that Act (s. 227), namely, "any personal action *brought by writ of summons* in any of the Superior Courts of Common Law at Westminster," created some difficulty with regard to certain sections of the Act. Such doubt as there was however on the point was to a great extent made immaterial by the 19 & 20 Vict. c. 108, which, though chiefly an act for the amendment of the County Courts Acts, incidentally effected an important change in the action of replevin. Before that Act, replevin was always *commenced* in the County Courts, though in certain cases the proceedings might be removed to one of the Superior Courts, and were there followed up to their termination. But by the 65th section of the Act just mentioned it was enacted, that "an action of replevin may be commenced in any Superior Court in the form applicable to personal actions therein, and such Court shall have power to hear and determine the same." It is to be remarked however, that the former power of the distrainee to commence proceedings in a County Court, and then to remove them under certain conditions, or to prosecute them in the County Court to their termination, is with some qualification retained.

Suggestion by Commissioners as to Replevin.

Upon these provisions the commissioners suggest no improvement; but the action of replevin has been recently declared to lie for an unlawful taking of any kind, and not merely for goods distrained for rent, or for cattle distrained damage feasant (see *Mellor v. Leather*, 1 Ell. & Bl. 619 and *Mennie v. Blake*, 25 L. J., Q. B. 399), and a doubt has been raised whether the above clauses of 19 & 20 Vict.

c. 108, do not apply exclusively to replevin for a distress. The commissioners therefore suggest in their Report the quieting of this doubt by an express enactment, and this has been accordingly introduced into the Act. (Sect. 22.)

They also suggested that it would be a considerable improvement in the procedure of replevin, if a tender of the rent or damage might be made after the distress or impounding had taken place, without waiting for the verdict of a jury. The expense of a trial is clearly unnecessary where the plaintiff in replevin does not dispute that rent to a certain amount was owing by him to the defendant, or damage to a certain amount done by the plaintiff's cattle to the defendant's land. And if the plaintiff is willing to pay in enough to cover this claim, the expense of any further proceedings ought in justice to fall upon the defendant, whatever the original merits might have been. These suggestions are carried out in the Act by sects. 23, 24.

*As to Payment
into Court by
Plaintiff in
Replevin.*

3. *As to Real Actions.*

In their First Report, the commissioners deliberately abstained from any remarks as to the procedure in real actions as distinct from personal ones. It was understood at the time, that the former class would be considered at a future time, and no evidence whatever respecting their procedure, for the purpose of their First Report, was taken by the commissioners. Accordingly, the Common Law Procedure Act, 1852, abounds with internal evidence that it was intended thereby to affect only the procedure in personal actions. Indeed, the interpretation given of the word "action," in sect. 227, already quoted, may be taken as conclusive of this point, if the preamble to the second section—"and with respect to the writs for the commencement of *personal* actions"—be not considered as necessarily limiting the application of other parts of the Statute. The question, however, does not appear to have arisen for judicial decision (so seldom do real actions occur) until last year, when an action of *quare*

*The Common
Law Procedure
Act, 1852, as
regards Real
Actions.*

impedit having been commenced against the Bishop of Exeter, by original writ, as before the Common Law Procedure Act, 1852, the declaration also and plea were drawn according to the former practice. It was, however, desired, on behalf of the plaintiff, to have recourse to the power given to plaintiffs by the Common Law Procedure Act, 1852, of applying for leave to reply double and to demur to the defendant's plea; which, unless allowed by that Act, was a course that could not be adopted. And this raised the question for decision, whether any and what provisions of the Common Law Procedure Act, 1852, extended to real actions. In support of the proposition that none of the provisions of the Act went to that extent, it was pointed out that, as to the greater part, if not all, of its provisions, it was expressly confined in its operation to actions over which the Courts have a common jurisdiction; that by the interpretation clause, the word "action" is to be understood to mean "any personal action brought by writ of summons in any of the Courts;" that the word "action" in sect. 81, by which double pleading is allowed, so interpreted, would not include *quare impedit*; and that previous statutes for the amendment of the proceedings of the Common Law Courts (2 Will. 4, c. 39, and 3 & 4 Will. 4, c. 42), and the Rules founded upon them, did not apply to real actions. (*Barnes v. Jackson*, 3 Dowl. P. C. 404.)

On the other side it was argued that the words used in the 81st section are general, and therefore, according to the ordinary rules of construction, are to be generally applied, there being no absurdity and nothing repugnant to any other part of the Statute in so doing; that with respect to the argument founded upon the general scope of the Act, it proved too much, because the provisions as to juries at least were applicable to all actions, whether real or personal, and that the interpretation clause was inapplicable to restrain the language in question, because it could only do so by restraining the application of the word

“action” to actions brought by “writ of summons,” which would exclude replevin, which would be inconsistent with the express mention of pleadings in replevin in the 86th section; and so that there is “something in the subject or context repugnant to such limited construction.”

After full consideration of the Statute and the arguments the Court came to the conclusion that the particular sections in question (sects. 81, 82) *did* apply to real actions. They remarked that it might indeed be “conjectured” that this question did not suggest itself to the minds of the framers of the Act, and even that they had no formed intention of dealing with actions other than personal. At the same time they had used words which were capable of a wider application, and which they ought to receive, not being restrained by the context. (See *Marshall v. The Bishop of Exeter*, 6 C. B. (N. S.), 716.)

It must be confessed that the reasoning on which this judgment is grounded appears far from satisfactory; nor is it rendered more so by the fact that the able judge by whom it was delivered was one of the chief authors of the Statute, of the scope and intention of which he speaks so doubtingly. Moreover this case only established the applicability of two of the sections of the Act to real actions; and inferentially tended to exclude from the same operation other useful provisions therein, with regard to the words and context of which similar arguments could not be used. Moreover the attention of the profession was thus drawn afresh to the subject of real, as distinct from personal actions, and it was immediately apparent that no good end was attained by their peculiar procedure; and that the time had come when the time honoured “original writ,” coeval with the origin of actions themselves in our jurisprudence, must be swept away altogether. It excited therefore no surprise that one of the recommendations of the commissioners was to effect this change. They remarked that the original writ sued out of Chancery in the actions of dower, writ of dower and *quare impedit* caused delay and ex-

*Reasoning of
the Common
Pleas not satis-
factory.*

*Suggestions of
the Commis-
sioners.*

Procedure assimilated to that of Personal Actions.

pense and gave rise to needless questions of form; and that there was no reason why the proceedings in those actions should differ unnecessarily from those in other actions. Their advice, as regards this subject, has been carried into effect by the 26th and 27th sections of the Act; which in substance provide, that whenever the proper remedy is an action of dower or *quare impedit* an action *in the Common Pleas* may be commenced by an ordinary writ of summons, on which is to be indorsed a notice that the plaintiff intends to declare in dower or *quare impedit*, as the case may be; and that the subsequent proceedings (including costs) on such writ shall be subject to the same rules and practice, as nearly as may be, to the proceedings of personal actions.

4. *As to Payment into Court.*

Before the Common Law Procedure Act, 1852, the right of the defendant to pay as much money into Court as he thought sufficient to satisfy the debt or damage for which he was sued, and by doing so to impose upon the plaintiff, if he prosecuted the action after such payment into Court was pleaded, the penalty of having to pay the costs of such further proceedings should he fail to prove a greater amount due, depended partly upon the practice of the Courts and partly upon Statutes. The Statute 3 & 4 Will. 4, c. 42, s. 21, expressly allowed a defendant to take this course *after first obtaining leave* from the Court or a judge in all personal actions, with certain exceptions, comprising actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution and debauching the plaintiff's daughter or servant. The Common Law Procedure Act, 1852, did not extend the kind of actions in which money could be paid in, but merely allowed it to be paid *without leave*. But notwithstanding either Statute, the Courts have held that in certain actions *on bonds* money cannot be paid into Court in respect of the principal, interest and costs; and on such payment

Payment into Court in Actions on Bonds.

being pleaded they have even struck the plea out and given judgment for the plaintiff. (See *England v. Watson*, 9 Mee. & W. 333; *The Bishop of London v. M'Neil*, 9 Exch. 490.) Indeed, if the plaintiff were to take the money so paid out of Court the judgment would not stand as a security for future breaches, as it ought to do under 8 & 9 Will. 3, c. 11, which was expressly excepted out of the operation of the Common Law Procedure Act, 1852. (See 15 & 16 Vict. c. 76, s. 96.)

The commissioners, however, said that in their opinion, "in actions on bonds" the defendant ought to be allowed to pay money into Court; and they made the same suggestion with regard to *detinue*, though it is difficult to suppose them ignorant of the decision by which the Court of Exchequer has already held that money may be paid into Court in that action, since the Common Law Procedure Act, 1852 (a).

Payment into Court in Actions for detaining Goods.

The recommendations contained in the Report upon this subject are, to a certain extent, carried into effect by the 25th section of the Act.

5. *As to Attachment of Debts.*

The "attachment clauses" of the Common Law Procedure Act, 1854, have worked in practice remarkably well, and have proved the means of producing fruit in many judgments which would have otherwise been altogether unprofitable. Yet the commissioners suggest one or two improvements in this procedure, which are as follows:—

Attachment Clauses in 17 & 18 Vict. c. 125.

1. It is desirable that the judge before whom an attachment summons is taken out should have a discretion to refuse to interfere in cases where the costs of the proceedings will, in his opinion, bear so large a proportion to the amount to be recovered as to make the remedy practically worthless or vexatious.

As to frivolous Cases.

(a) *Crossfield v. Such*, 8 Exch. 159, 165.

*As to Lien or
Charge by
third Parties.*

2. It sometimes happens that the garnishee is willing to pay the debt if he can safely do so, but doubts whether the execution debtor is really entitled to it, or whether some other person is not. To meet these cases a procedure in the nature of an interpleader summons should be created, under which the garnishee may call on any person to whom he suggests the debt is really due to appear, and according to the result of the subsequent proceedings the creditor or person called on should be barred.

*As to inequitable
Debts.*

3. A judge ought to be allowed a discretionary power in cases where the garnishee admits the debt in point of law, but where it would be inequitable for the execution debtor to enforce it. As for instance, where the garnishee has a cross claim against the judgment debtor for an amount exceeding the judgment recovered, but which cross claim is not yet due. In such cases the judge should have power to make such order as shall in his opinion effect complete justice between all parties.

The two first of these suggestions are carried into effect by sects. 27—30 of the Act. The third suggestion, which in point of fact is that a new equitable power be conferred on the Courts of Law, has no answering provision in the Act.

6. *As to Costs.*

With respect to this subject, the object to be attained is twofold: 1, that the right to costs should be clearly defined, and 2, that the amount awarded should be uniform in all the Courts. But the Statutes giving parties a right to costs are so numerous, and so confused with modifying and repealing enactments passed at different times, that a revision and consolidation of the Statutes relating to costs is the only satisfactory course. Yet the leading principles on this branch of the law are well established and free from objection. The party who substantially succeeds has, as he ought to have, the general costs of the cause, and the opposite party who may succeed on one or more issues,

either of law or fact has, as he ought to have, the costs of those issues; that is, of those parts of the cause on which he succeeds.

But any such partition of costs ought to be subject to the general principle that in *frivolous* actions the plaintiff should recover no costs at all, and upon this head the commissioners recommended the following alteration of the law. *As to Costs in frivolous Actions.*

Hitherto the rule has been (irrespective of the provisions with regard to the County Courts) that under 43 Eliz. c. 6, the judge at nisi prius may give a certificate which will deprive the plaintiff of any costs beyond forty shillings, if the debt or damages recovered do not amount to that sum. But that statute does not apply to the costs of actions of *trespass* or *on the case*; which are (in general) regulated by 3 & 4 Vict. c. 24, and in which a plaintiff who obtains less damages than forty shillings gets no costs whatever, unless the judge certifies that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action was brought, or that such trespass or grievance was wilful and malicious. The Report recommends the adoption of a far more general rule, viz. that, whenever a plaintiff *in any action* recovers less than five pounds damages, it should be in the discretion of the judge to allow or disallow his costs. And this, with certain modifications, has been adopted by the legislature, though they confine the new provision to *torts*. (Sect. 34.)

7. *As to Juries.*

The commissioners invited renewed attention to the observations contained in their Second Report (p. 6) with regard to the constitution of juries, in which they took occasion to advise that the standard of qualification of common jurors in the country (viz. a rating on a value of £20) should be raised; and that on every trial there should

As to the Constitution of Juries.

be included, in practice as well as in contemplation of law, a certain number of jurymen taken from the special jurors' list. The commissioners in their present Report again insist, that a very great improvement would be effected in the constitution of juries by the admixture of persons of higher education and intelligence.

The Act however takes no notice of this advice—no provision being inserted therein with regard to juries.

CHAPTER V.

OF CERTAIN MISCELLANEOUS PROVISIONS IN THE ACT.

SUCH then are the recommendations contained in the Report, and to the extent in each instance as above explained they have been adopted by the legislature. It remains only to mention one or two provisions in the Act which are not traceable to any recommendation contained in the Report. These are:—

1. *Section 32*, which provides for the plaintiff's costs in respect of preparing, issuing and serving a writ of mandamus, or of injunction issued under the Common Law Procedure Act, 1854. *Costs of Writ of Mandamus or Injunction.*

2. *Section 33*, which provides, that writs of injunction against a corporation may be enforced, either by attachment against the directors or officers, or by writ of sequestration against their property and effects. *Enforcing Writ of Injunction against a Corporation.*

3. *Section 35*, which repeals the 88th section of the Common Law Procedure Act, 1854, and confers upon the Common Law Courts and Judges a similar jurisdiction as may be exercised by the *Court of Chancery* under the 9th part of the Merchant Shipping Act, 1854; such jurisdiction to be exercised upon summary application by rule or order. *Liability of Shipowners.*

The jurisdiction of the Court of Chancery above referred to was given by the 17 & 18 Vict. c. 104, s. 514, to determine the amount of liability incurred by a shipowner to *several* claimants in respect of loss of life, personal injury or loss or damage to the ship or goods; and to distribute such amount rateably among the several claimants, with

power to stop all actions and suits pending in any other Courts in relation to the same subject-matter.

The occasion for the present provision was an error in the Common Law Procedure Act, 1854, which was ably exposed by Mr. Kerr in his annotated edition of that Act (a).

(a) See Preface, pp. ix. x.

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THE
COMMON LAW PROCEDURE ACT,
1860.

23 & 24 VICT. CAP. 126.

An Act for the further Amendment of the Process, Practice and Mode of Pleading in and enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster. [28th August, 1860.]

WHEREAS it is desirable further to improve the process, practice and mode of pleading in and in some respects to enlarge the jurisdiction of the Superior Courts of Common Law: Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, as follows:—

The above *title* differs from that which is affixed to both of the two previous Common Law Procedure Acts, in omitting any notice of the Palatinate Courts of Law of Lancaster and Durham. Yet the present statute contains (s. 40) a provision similar to that inserted in the previous Acts, with respect to the extension and application of its provisions (subject to certain modifications) to the Court of Common Pleas at Lancaster and the Court of Pleas at Durham. (And see also s. 12.)

A remark of the same nature may be made as to the *preamble*. In the Act of 1852, "the Superior Courts of Common Law at Westminster" are mentioned in the preamble. In the Act of 1854, there is no preamble at all. In the present Act, the words "at Westminster" are omitted. It is somewhat unfortunate that these introductory parts of the three measures (forming as they do a regular and complete series) were not made to correspond.

[RELIEF AGAINST FORFEITURE.]

In the Case of Non-payment of Rent.

Relief against
forfeiture for
nonpayment of
rent.

I. In the case of any ejectment for a forfeiture brought for non-payment of rent, the Court or a judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, up to and within the like time after execution executed, and subject to the same terms and conditions in all respects as to payment of rent, costs and otherwise, as in the Court of Chancery; and if the lessee, his executors, administrators or assigns, shall upon such proceeding be relieved, he and they shall hold the demised lands according to the lease thereof made, without any new lease.

The principle of the equitable jurisdiction thus conferred upon the Courts of Law in these cases is not a novel one. It was given to them more than 150 years ago by 4 Geo. 2, c. 28, s. 4; and it was re-enacted almost in the same words by the Common Law Procedure Act, 1852, s. 212. The Act of Geo. 2, in other sections, allowed the landlord to whom half a year's rent shall be owing, and who has a right of re-entry in consequence, to bring an action of ejectment without any formal demand or re-entry, and thus recover possession of the premises; and in addition to this provision in favour of the landlord, that Act took occasion at the same time to define and restrain the jurisdiction which the Court of Chancery had from the earliest times assumed in these cases of ejectments brought by landlords against their tenants on a forfeiture by reason of breach of the covenant to pay rent, and fixed six months after execution in the ejectment as the latest period within which the tenant might apply for relief in equity (*Steph. Lush, Pr.*, pp. 785, 786.) Before this restriction, the landlord was always liable to be, in his turn, evicted if his tenant paid up the rent, costs and interest, and proceeded thereupon to obtain relief against the forfeiture. (*Per Mansfield, C. J., Doe d. Hitchins v. Lewis*, 1 Burr. 619.)

But having thus provided for the landlord, the Act of Geo. 2 (and the answering clause in the Common Law Procedure Act, 1852, s. 212), then enacted a clause in favour of the tenant to the following effect:—that if the rent and costs be paid or tendered *by the tenant or his assignee* to the plaintiff at any time *before the trial* in the ejectment brought, “all further proceedings in the ejectment shall cease and be discontinued.”

An application for a stay of proceedings therefore, under such circumstances, was to the *equitable* jurisdiction of the Court of Law; and the new Act in this section only varies this equitable jurisdiction in the following particulars:—

1. Under the previous Acts, relief at law against forfeiture could only be given *before trial*. (*Doe d. West v. Davis*, 7 East, 363.)
2. The manner of relief is no longer confined to a simple *stay of proceedings*, but may be administered by making a special rule or order adapted to the circumstances of the case, and subject to the same terms and conditions as would be imposed by the Court of Chancery on a tenant praying for an injunction against the ejectment.
3. There is an *appeal* now given against the decision of Court in these cases.

The following are the rules on this species of relief in the Court of Chancery, some depending solely on general equitable doctrines, others being enforced by statute:—

1. The tenant will not be relieved if he fail to apply within six months after the execution of an *habere facias possessionem* sued out in the action of ejectment. (4 Geo. 2, c. 28, ss. 2, 3; 15 & 16 Vict. c. 76, s. 210.)
 2. It is a condition precedent to such relief, that the tenant (within forty days after answer filed) shall pay the rent and interest, together with all the expenses of the proceedings. (*Daniel's Pract. Chanc.*, vol. ii. p. 1249.)
 3. Relief will be granted, although the term has ceased by reason of the lessor's entry under a clause of re-entry. (*Robert's Principles of Equity*, p. 194.)
 4. No relief will be granted if the lease were gained by fraud or granted upon a false suggestion. (1 *Mad. Chan. Pr.*, p. 36.)
 5. Where a lease is forfeited by the non-payment of rent, and there are several underleases, relief against the forfeiture will be given on the application of some of the under-lessees, on their paying the rent in arrear to the original lessor; but the rent will not be apportioned, and those of the under-lessees who pay it must compel the rest to contribute. (*Webber v. Smith*, 2 Vern. 103.)
 6. It need not necessarily appear that the failure in paying the rent arose from accident or insolvency; but relief will be given even if the default of the tenant should have been negligent or wilful. (*Sanders v. Pope*, 12 Ves. 289.)
-

It may be observed that this species of relief in equity is grounded upon the principle that compensation is made to the landlord by the payment of the rent with interest. But it has been said by high authority, that this doctrine is imperfect and unjust, and that it is even contradicted by general experience. (See *Hill v. Barclay*, 16 Ves. 405; 18 Ves. 61.)

The concluding clause of the section is copied from 4 Geo. 2, c. 28, s. 4, where it applies to the relief granted *in equity*. It might be important in a case where the landlord has not only ejected his tenant but disposed of the land to a third party; and the effect seems to be that no lease or sale could safely be made by the landlord till after the expiration of the six months.

In the Case of a Failure to insure.

Relief against
forfeiture for
non-insuring.

22 & 23 Vict.
c. 35.

II. In the case of any ejectment for a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, the Court or a judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal, as hereinafter mentioned, in all cases in which such relief may now be obtained in the Court of Chancery under the provisions of an act passed in the session of parliament held in the twenty-second and twenty-third years of the present reign, intituled "An Act to further amend the Law of Property and to relieve Trustees," and upon such terms as would be imposed in such Court.

In order to understand the full scope of this section, it is proper to consider the effect of certain of the clauses of the "Property and Trustees Relief Amendment Act" of last session referred to in the margin.

By that Statute power is given to a Court of Equity to relieve, upon such terms as the Court may see fit, against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire,—where no loss or damage by fire has happened; and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise, without fraud or gross negligence; and where there is an insurance on foot at the time of the application to the Court, in conformity with the covenant to insure. (22 & 23 Vict. c. 35, s. 4.)

The Court of Chancery has, however, no power to relieve the same person more than once in respect of the same covenant or condition; nor where a forfeiture under the covenant in respect of which relief is sought shall have been already waived

out of Court in favour of the person seeking the relief. (Sect. 6.)

The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance, relating to the building covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant. (Sect. 7.)

Where on the *bonâ fide* purchase of a leasehold interest under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of rent accrued due before the completion of the purchase; and there is subsisting, at the time of the completion of the purchase, an insurance in conformity with the covenant; the purchaser or any person claiming under him shall not be subject to any liability by way of forfeiture or otherwise in respect of any breach of the covenant committed at any time before the completion of the purchase of which the purchaser had not notice before the completion of the purchase; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant. (Sect. 8.)

The preceding provisions are applicable to leases for a term of years absolute, or determinable on a life or lives or otherwise, and also to a lease for the life of the lessee or the life or lives of any other person or persons. (Sect. 9.)

Prior to the 22 & 23 Vict. c. 35, a forfeiture by reason of a breach of the covenant to insure, and a right of re-entry thereby accruing, would not have been relieved even in Equity (still less in a Court of Law), as it was considered that no adequate compensation could be made to the lessor. (See *Reynolds v. Pitt*, 19 Ves. 134; *Gregory v. Williams*, 9 Hare, 683.)

It is to be observed, that the Courts of Law are now enabled to relieve only where Courts of Equity would relieve under the above provisions. In order therefore to ground a motion for a stay of proceedings in an ejectment by a landlord against his tenant, the following matters must appear from the affidavits filed in support of the application.

1. That the ejectment is brought on a right of re-entry accruing on a breach of a covenant for insurance against loss or damage by fire in the defendant's lease.

2. That neither loss or damage by fire has happened up to the time of application. (See *Austin v. Drewe*, 4 Taunt. 436.)
3. That the breach has been committed through accident, mistake or otherwise, without fraud or gross negligence. (As to "accident," see *Story, Eq. Jur. ss.* 75—109; as to "mistake," see *ib. ss.* 110—183; as to "fraud," see *Roberts's Principles of Equity*, pp. 38—46; as to "gross negligence," see *Jones on Bailm.*, p. 119.)
4. That there is, at the time of application, an insurance on foot in conformity with the covenant to insure. (Note, that it would be no defence to the *ejectment*, if allowed to proceed, that the insurance office has waived the breach and accepted subsequent premiums; *Wilson v. Wilson*, 14 C. B. 616; or that there is a valid insurance on foot, but not in strict conformity with the terms of the lease; *Penniall v. Harborne*, 11 Q. B. 368, *sed vide Havens v. Middleton*, 10 Hare, 641.)

Again, it would be an answer to the application for a stay of proceedings, if affidavits could be filed in reply to those on which the rule nisi was obtained, showing either—

1. That the defendant had already been relieved in respect of the same covenant;—though it would not be enough to show that such relief had already been given to the assignor, testator or administrator of such defendant; or,
2. That the defendant has a defence to the action by reason of the plaintiff's having already waived the forfeiture in question, out of Court.

It may also be observed, that the Courts of Law seem, if this section be taken in connection with 22 & 23 Vict. c. 35, s. 8, to be now enabled to stay an *ejectment* brought on its being made to appear—

1. That the *ejectment* is brought against the vendee of the lessee of the plaintiff on a right of re-entry accruing to the plaintiff by reason of a breach of such a covenant to insure in the lease; and,
2. That such lease, before the *bond fide* purchase by the defendant, had been forfeited by a breach of which the defendant had no notice: [that is, either *actual* or *constructive* notice, as to which see *Le Neve v. Le Neve*, 2 Lead. Cas. in Equity, 34—55], but,
3. That on such purchase the defendant was furnished with the written receipt of the person entitled to receive the rent or his *agent* (see *Doe d. Nash v. Bird*, 1

Mee. & W. 408), for the last payment of rent, which accrued before the completion of the purchase; and

4. That at the time of the completion of the purchase, and at the time of application, there was subsisting an insurance in conformity with the covenant.

It is, however, to be remembered, that, though under the above circumstances, the ejectment against the purchaser would be stayed, the lessor (or his executors, administrators or assigns) might recover damages in covenant against the lessee (or his executors or administrators or assigns) as before the Act. (See 22 & 23 Vict. c. 35, s. 8).

Minute of Relief.

III. Where such relief shall be granted, the Court or a judge shall direct a minute thereof to be made by indorsement on the lease or otherwise.

Minute of relief granted.

A similar section is also inserted in the Act to amend the law of property and to relieve trustees (22 & 23 Vict. c. 35, s. 5). Its apparent object is to preserve evidence of relief having been given, so as to bar any future application on behalf of the same person in respect of the same covenant.

It would seem that no such a minute will be required (though the words are general) where the relief has been in respect of non-payment of rent under the first section, as in those cases there is in the statute no prohibition of a subsequent relief in respect of the same defendant and the same covenant.

Appeal.

IV. Any order made by a judge upon an application for relief under the provisions of this Act shall be subject to an appeal to the Court, and may be discharged, varied or set aside by the Court, upon such terms as the Court shall think fit, on application made thereto by any party dissatisfied with such order.

Appeal to the Court from order of judge.

This section is only declaratory; for as the general rule, and unless a judge has by statute an *exclusive* jurisdiction, or the parties have agreed to abide by its decision (see *Shortridge v. Young*, 12 Mee. & W. 5; *Hall v. West*, 1 D. & L. 418; *Kilkenny and Great Southern and Western Railway Company v. Fielden*, 6 Exch. 82), a party who is dissatisfied with the judge's order may apply to the Court to have it rescinded; and this though the judge have decided the case on its own merits. (*Steph. Lush, Pr.*, p. 676.)

It would seem that if the party dissatisfied should appeal to the judge himself instead of to the full Court, the latter will

not afterwards interfere. (*Thompson v. Becke*, 4 Q. B. 759.) If an order be *refused* by a judge, it is irregular to make the same application to another judge. (*Wright v. Stevenson*, 5 Taunt. 850.) The judge's order need not be made a rule of Court for the purpose of moving the Court thereon (*Spicer v. Todd*, 2 Tyrw. 172), but the motion must be founded on a duplicate original, not on a copy (*Barrett Navigation v. Shower*, 18 L. J., C. P. 145), or the affidavit in support of the motion may state the substance of the order. (*Shirley v. Jacobs*, 3 Dowl. P. C. 101.) The affidavits used at chambers need not be re-sworn (*Pickford v. Ewington*, 4 Dowl. P. C. 453), but must be brought before the Court at the time of moving (*Heath v. Nesbitt*, 11 Mee. & W. 669), on application to the Master. (See *Reg. Gen. H. T.* 1853, *Pr. r.* 147.) Fresh matter may be laid before the Court on additional affidavits. (*Pike v. Davis*, 6 Mee. & W. 546.) As to the case of the party supporting the order, see 17 & 18 Vict. c. 125, s. 45.

The application to the Court must be made without unnecessary delay and within a reasonable time. (See *Clement v. Weaver*, 3 Man. & Gr. 551; *Griffin v. Bradley*, 6 C. B. 722.) As a general rule, it cannot be made after the end of the term following the date of the order. (*Jordan v. Willcoxon*, 3 Ell. & Bl. 193; and see *Craske v. Smith*, 4 C. B., N. S. 446.)

Power to appeal from order of Court.

V. It shall be lawful for the party against whom the Court makes any rule or order in respect of such relief to appeal from such rule or order.

These appeal clauses from the decision of the full Court to the regular Courts of Error (sects. 5—11), are adapted from the answering provisions of the Common Law Procedure Act, 1854 (sects. 35—42), with regard to appeals on motions to enter a verdict or nonsuit, or for a new trial. The object of these provisions was to allow a party dissatisfied with the ruling of the Court below, upon a matter of law arising at nisi prius, to appeal *directly* to the Court above and obtain there the same judgment as he ought to have had in the Court below, without being driven to the tedious and expensive method of successive trials and ultimately a bill of exceptions. The object of the present appeal, however, is not the same; but rather to engraft upon the jurisdiction of the Court of Law in which an ejectment *for rent* was pending, a right of appeal which the litigant did not before possess; and to qualify with the same right, the novel jurisdiction given to such Court by the present statute in respect of ejectments pending for forfeitures in respect of *non-insurance*.

The expression in the section "rule or order" seems correct; because, though the direction of the Court (as distinct from that

of the judge) is always by *rule*, yet as the order appealed against need not previously be made a rule, if the application that it be rescinded be rejected, the proceedings by way of appeal will be on the *order*. It may be remarked, however, that the word "judgment" should have been added to meet the case of an application made after execution. And, accordingly, in sect. 9, *infra*, the word "judgment" appears; as it should have done in the present section.

VI. The Courts of Error shall be Courts of Appeal for the purposes of this Act. Courts of Error to be Courts of Appeal.

In the answering section in the Common Law Procedure Act, 1854, the words used are, "The Court of Error, the Exchequer Chamber and the House of Lords." From the Court of Common Pleas at Lancaster and the Court of Pleas at Durham the Court of *Queen's Bench* is the "Court of Error" (see *post*, sect. 42), and, consequently, in actions in those Courts, is the first Court of Appeal.

VII. No appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney, and to one of the masters of the Court, within four days after the decision complained of, or such further time as may be allowed by the Court or a judge. Notice of appeal.

The time thus allowed is the same as in the case of *error*. (See Common Law Procedure Act, 1852, s. 149; *Steph. Lush, Pr.*, p. 509.) The Form of Notice of Appeal may be as follows:—
In the Q. B. ["C. P." or "Exch. of Pleas."]

Between A. B. plaintiff, and C. D. defendant.

Take notice that the plaintiff [or "defendant"] intends to appeal to the Court of Error in the Exchequer Chamber, pursuant to the Common Law Procedure Act, 1860, against a decision of the Court of Queen's Bench ["C. P." or "Exch. of Pleas"], given on the — day of — instant, in refusing to grant a rule to show cause why proceedings in the above action should not be stayed on the terms, &c. [or if the rule was granted and afterwards discharged, then say, "in discharging" (or if made absolute, "in making absolute") a rule granted in this cause on —, to stay proceedings therein on the terms, &c.] Dated —.

Yours, &c.

P. A., plaintiff's [or "defendant's"] attorney.

To — the above-named defendant [or "plaintiff"] and
Mr. D. A. his attorney.

As to an application after the time limited by the above section, see *Watson v. Lane*, 27 L. T. 108, Exch.

Bail.

VIII. Notice of appeal shall be a stay of execution, provided bail to pay the sum demanded and costs be given, in like manner and to the same amount as bail in error, within eight days after the decision complained of, or before execution delivered to the sheriff.

This section is not happily worded. If the appeal be from the decision of the Court with respect to an ejectment for *rent* even, though no doubt a sum certain is in arrear, yet the ejectment is not brought to recover that or any sum of money, but the possession of the premises. And if the rent were the subject of the action, covenant and not ejectment would be the proper remedy. And to the case of an ejectment brought in respect of a *non-insurance*, the expression used is even still more inapplicable. It is apprehended that, in either case, all that is intended is that bail must be given for the *costs of the ejectment*, including the incidental proceedings.

The bail given is in double the sum due, and is in the form of a bond conditioned to prosecute the proceedings in the Court of Appeal with effect; and also to pay such costs and damages as may be awarded for the delay of execution. (See *Steph. Lush, Pr.*, p. 509.)

Form of appeal.

IX. The appeal hereinbefore mentioned shall be upon a case to be stated by the parties (and in case of difference to be settled by the Court, or a judge of the Court appealed from), in which case shall be set forth so much of the pleadings, facts, and the order, rule or judgment objected to as may be necessary to raise the question for the decision of the Court of Appeal.

Judgment of Court of Appeal and power to remit proceedings.

X. The Court of Appeal shall give such judgment or make such rule as ought to have been given or made in the Court below, and shall have power to remit the cause, with such directions as they shall think proper; and all such further proceedings may be taken thereupon as if the judgment or rule had been given or made by the Court below.

Power of Court of Appeal as to costs, &c.

XI. The Court of Appeal shall have power to adjudge payment of costs and to order restitution.

The practice as to *costs* and ordering *restitution* in these cases will be the same as in error. (See *Steph. Lush, Pr.*, pp. 513, 514.) The *costs* referred to are those of the proceedings in appeal, which, it is presumed, will be in general given

to the successful party where the Court of Appeal affirm the judgment below, but will not be given to either party when the judgment below is reversed. (See *Windle v. Barker*, 6 Ell. & Bl. 675; *Walker v. Bartlett*, 18 C. B. 845.)

A writ of *restitution* will of course be required only in those cases where application for relief is granted after execution executed and the tenant evicted; and even in such cases, instead of actually suing out the writ, application may be made for a *rule of Court* ordering restitution. (See *Steph. Lush, Pr.* 514.)

[INTERPLEADER PROCEEDINGS.]

Titles of Claimants.

XII. Where an action has been commenced in respect of a common law claim for the recovery of money or goods, or where goods or chattels have been taken or are intended to be taken in execution under process issued from any one of the Superior Courts, or from the Court of Common Pleas at Lancaster or the Court of Pleas at Durham, and the defendant in such action, or the sheriff or other officer, has applied for relief under the provisions of an Act made and passed in the session of parliament held in the first and second year of the reign of his late majesty King William the Fourth, intituled "An Act to enable Courts of Law to give Relief against adverse Claims made upon Persons having no Interest in the Subject of such Claims," it shall be lawful for the Court or a judge to whom such application is made to exercise all the powers and authorities given to them by this Act and the hereinbefore mentioned Act passed in the session of parliament held in the first and second years of the reign of his late majesty King William the Fourth, though the titles of the claimants to the money, goods or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another.

Interpleader may be granted, though titles have not a common origin.

1 & 2 Will. 4, c. 58.

It will be seen from the Introduction (p. 20) that this provision has been enacted on account of the Courts of Law having felt

themselves to be bound in disposing of an interpleader summons for the relief of a stake-holder, by the rules of equity (*Per Alderson, B.*, 2 Dowl. N. S. 801), one of which is, that a bill of interpleader lies only in cases where there is *privity* of some sort between all the parties,—such as privity of estate or title or contract,—and where the claim by all is of the same nature and character (see *Simon on Interpleader*, p. 6); and will not be sustained where the claimants assert their rights under adverse titles and not in privity and under claims of different natures. (*Mitf. Eq. Pl.*, pp. 142, 143; *Dungay v. Angrove*, 3 Bro. C. C. 36; 2 Ves. Jun. 304.) For example, the Court of Chancery has disallowed an interpleader in behalf of a tenant sued for rent by a stranger, who set up a title paramount to the landlord. (See *Clark v. Byne*, 13 Ves. 383; *Crawshay v. Thornton*, 2 Myl. & C. 1.)

The case of *Slaney v. Sidney* (14 Mee. & W. 800) appears to have been decided upon the above equitable rule; and would, therefore, it is apprehended, be now determined in the contrary way by reason of the present enactment. There, an interpleader rule was moved for, on affidavits which showed that the defendants had purchased certain chests of tea, the warrants for which were made out in the plaintiff's name. But before the time for payment arrived the defendants were served with a notice from third parties, who asserted that the warrants had been improperly obtained from them. Here the Court refused the rule, *Parke, B.*, observing that the claimants did not claim the same things: one seeking the benefit of a contract; the other the value of the chattel which was the subject-matter of that contract. (See *Steph. Lush, Pr.*, pp. 582—590.)

The old rule had no application to interpleader proceedings instituted on behalf of the *sheriff*; as the Court of Chancery has not been in the habit of interfering for his relief. [See *Tufton v. Harding*, 1 L. T. R. (N. S.), p. 264.]

Sale of Goods seized.

Court or judge
may direct
sale of goods
seized in exe-
cution.

XIII. When goods or chattels have been seized in execution by a sheriff or other officer under process of the above-mentioned Courts, and some third person claims to be entitled under a bill of sale or otherwise to such goods or chattels, by way of security for a debt, the Court or a judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise as they or he shall think fit, and may direct the application of the proceeds of such sale in

such manner and upon such terms as to such Court or judge may seem just.

See the Introduction, pp. 17, 21 ; see also *Barker v. Dynes*, 1 Dowl. P. C. 169, as to sheriff's poundage in case of sale ; and *Steph. Lush, Pr.* p. 389.

Summary Jurisdiction of Judge.

XIV. Upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the Court or judge wherever, from the smallness of the amount in dispute or of the value of the goods seized, it shall appear to them or him desirable and right so to do, at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner, upon such terms as they or he shall think fit to impose, and to make such other rules and orders therein as to costs and all other matters as may be just.

Power to Court or judge to decide summarily in certain cases.

The power thus given to the Court or judge is new. Formerly, an issue could only have been dispensed with by *consent* (as to which see *Harrison v. Wright*, 13 Mee. & W. 816), however trivial might have been the matter in dispute. In interpleader cases without issue, it has been hitherto held that the Court has no power to review the award of a judge. (*Shortridge v. Young*, 1 D. & L. 416.) But as the arbitration given by this clause of the Act is *compulsory*, the Court would probably interfere, if they saw fit to do so on other grounds. (See *Teggin v. Langford*, 10 Mee. & W. 556.)

Special Case.

XV. In all cases of interpleader proceedings where the question is one of law, and the facts are not in dispute, the judge shall be at liberty, at his discretion, to decide the question without directing an action or issue, and, if he shall think it desirable, to order that a special case be stated for the opinion of the Court.

Special case may be stated where facts undisputed.

This provision also gives a new power to the judge before whom an interpleader summons is taken out, either by a stakeholder or a sheriff. Its effect is to make the consent of the parties no longer a condition precedent to a disposal and determination of their claims by the judge in any cases *in which*

there is nothing for a jury to decide, without regard to the amount in dispute or the value of the goods seized. Formerly, if the judge felt a difficulty in disposing of the summons, he could only refer it to the Court under 1 & 2 Will. 4, c. 58, s. 5. (See *Steph. Lush, Pr.* pp. 582, 583.)

Proceedings on
special case in
Court below
and in error.

XVI. The proceedings upon such case shall, as nearly as may be, be the same as upon a special case stated under "The Common Law Procedure Act, 1852;" and error may be brought upon a judgment upon such case; and the provisions of "The Common Law Procedure Act, 1854," as to bringing error upon a special case, shall apply to the proceedings in error upon a special case under this Act.

See 15 & 16 Vict. c. 76, s. 46, as to a special case for the opinion of the Court without pleadings. And see 17 & 18 Vict. c. 125, s. 32, as to *error* on a special case. (As to these proceedings see also *Elliott v. Bishop*, 10 Exch. 496, 522; 11 Exch. 113, 321; and *Steph. Lush, Pr.* pp. 706—712.)

Judgment and
decision to be
final.

XVII. The judgment in any such action or issue as may be directed by the Court or judge in any interpleader proceedings, and the decision of the Court or judge in a summary manner, shall be final and conclusive against the parties and all persons claiming by, from or under them.

This clause has been already enacted with regard to interpleader proceedings, by 1 & 2 Will. 4, c. 58, s. 2.

Rules and Orders.

Rules, orders,
&c. made in
interpleader
proceedings
may be entered
of record and
made evidence.

XVIII. All rules, orders, matters, and decisions to be made and done in interpleader proceedings under this Act (excepting only any affidavits) may, together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment in the Superior Courts of Common Law.

This clause, also, is copied from the Interpleader Act (1 & 2 Will. 4, c. 58, s. 7). But that section qualified the statutable effect of such rule or order, by adding "except only as to

becoming a charge on any lands, tenements or hereditaments." It has, however, been considered that the effect of the subsequent statute, 1 & 2 Vict. c. 110, s. 18, was to make such an interpleader rule or order a charge on the land notwithstanding. There can, at all events, be no doubt with regard to such interpleader proceedings as are taken under this Act, as the wording here used is express. It is to be borne in mind, therefore, that by the Act of last session to amend the Law of Property (23 & 24 Vict. c. 38), it is provided (sect. 5), that the provisions therein contained with regard to *judgments* shall include all rules and orders "having the operation of a judgment." Hence interpleader rules and orders under the Common Law Procedure Act, 1860, will only bind *lands* (as to *bonâ fide* purchasers for valuable consideration, or mortgagees, with or without notice), provided process of execution thereon be issued and registered before the execution of the conveyance or mortgage, and the payment of the money; and provided, also, such process shall have been executed and put in force within three calendar months from the time of such registration.

[PROCEDURE AND PRACTICE.]

Parties to Actions.

XIX. The joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of misjoinder being raised, then in favour of such one or more of them as shall be adjudged by the Court to be entitled to recover: provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the Court or a judge.

Joinder as plaintiffs of all persons supposed to be legally entitled.

This alteration of the law of actions (as to the general design of which, see the Introduction, pp. 23—25) may be considered—1. As to the change as it affects the defence to the action. 2. As it affects the judgment; and 3. As it affects the costs.

1. *As to the Change with regard to the Defence to the Action.*] Formerly the joinder of too many plaintiffs in an action *on a contract* was an objection which might have been

taken at the trial upon a plea denying the contract; or, if the misjoinder appeared on the record, it might have been taken by demurrer, motion in arrest of judgment, or proceedings in error. (See *Steph. Lush, Pr.* p. 23.) So, also, in an action for a *wrong independent of contract*, the joinder of a plaintiff who had not a joint legal interest in the damages to be recovered, was (unless amended) fatal at any stage of the proceedings. (*Ib.* p. 118.) In all cases of misjoinder of parties, however, the Common Law Procedure Act, 1852 (sect. 35), allowed an amendment, *unless* it appeared to the Court or judge that the misjoinder had been made for the purpose of obtaining some undue advantage, or that injustice would be done by the amendment, provided always the person to be struck out was originally introduced into the proceedings without his consent, or consented to be struck out. And such an amendment might be made on such terms as the Court or judge thought proper.

The precise nature of the change in the law made by this section (which will prevent the necessity for such amendments) will be best seen by a few examples. Thus in an action brought by shipowners to recover the balance of monies received by the defendant (as agent) on account of a certain ship, it appeared that the defendant was accountable as agent only to one of the plaintiffs, there being no privity between the defendant and the other part owners. On this ground there was a nonsuit. (*Sims and Others v. Brittain*, 4 B. & Ad. 375.) Again, if a *deed* between A. and C. contained a covenant by A. to pay to C. money for the use of B., C. alone could have sued on it, and the joinder of B. would have been fatal. (*Offley v. Ward*, 1 Lev. 235.) And this would have been so, even though the covenant to pay had been made with B. if he were not a party to the deed. (*Gilby v. Copley*, 3 Lev. 139.) So, where a bye-law directed a penalty to be paid to the masters and wardens of a certain company, an action for a penalty brought by the masters, wardens *and commonalty* was held not to be maintainable. (*Company of Feltmakers v. Davis*, 1 Bos. & P. 98.)

2. *As to the Judgment.*] The effect of the change, with regard to the judgment, will be the same as if the objection of misjoinder had been taken, and the record amended by the striking out of the person improperly joined.

3. *As to the Costs.*] This provision for the defendant's costs would have been imposed upon the plaintiff under the former system, where an amendment of a misjoinder was applied for and allowed.

Defendant to have benefit of set-off, though some plaintiffs improperly joined.

XX. Upon the trial of such cause a defendant who has therein pleaded a set-off may obtain the benefit of his set-off by proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more of

such plaintiffs was or were improperly joined, or on proving that the plaintiff or plaintiffs who establish their right to maintain the cause is or are indebted to him.

This provision is clearly required in consequence of the preceding section. For the plea of "set-off," as given by 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 5, is applicable only where there are mutual debts *between the plaintiff (or plaintiffs) and the defendant*; and therefore if the defendant were only able to give evidence of a debt due to him from *one* or *some* of the plaintiffs on the record, he would have failed. The only exception to this was, where the plaintiff, from whom the debt to the defendant pleaded by way of set-off was owing, was the only party with whom the defendant supposed himself to be dealing, being led to that supposition *by the conduct of the other plaintiff—a secret partner*. (See *Gordon v. Ellis*, 15 L. J. 178, C. P.)

XXI. No other action shall be brought against the defendant by any person so joined as plaintiff in respect of the same cause of action. No other action for same claim to be brought.

Some observations upon this section will be found in the Introduction, p. 25.

The proper manner for a defendant to proceed if so sued a second time would be to plead "judgment recovered." (As to which plea, see Reg. Gen. H. T. 1853 (Pr.), r. 10.) Such a plea (see *Chitt. Pract. Forms*, 7th ed., p. 457) might be thus adapted to the present case:—

"Says that *one A. B.* and the plaintiff heretofore in the Court of, &c. impleaded the defendant in respect of the same cause of action in the declaration above mentioned, and such proceedings were thereupon had, that afterwards and before the commencement of this suit the said A. B. by the consideration and judgment of the Court recovered in the said action against the defendant the sum of £—— in respect of the said cause of action and costs."

A plea to the effect that in the previous action a verdict had passed for the *defendant* on the merits would also be good. (See *Plummer v. Woodburne*, 4 B. & C. 625; *Vooght v. Winch*, 2 B. & Ald. 662.) It may be doubtful whether such a defence would be available on the general issue.

Action of Replevin.

XXII. The provisions of an Act passed in the session of parliament held in the nineteenth and twentieth years of the reign of her present majesty, chapter one hundred and Provisions of 19 & 20 Vict. c. 108, as to replevin ex-

tended to all cases of replevin.

eight, which relate to replevin, shall be deemed and taken to apply to all cases of replevin, in like manner as to the cases of replevin of goods distrained for rent or damage feasant.

The clauses above referred to are to the following effect:—

The registrar of the County Court (in place of the *sheriff of the county* as formerly), in the district of which any distress subject to replevin is taken, is to approve of replevin bonds, and to grant replevins and issue all necessary process thereto, to be executed by the high bailiff. (19 & 20 *Vict. c.* 108, s. 63.)

The registrar, at the instance of the distrainee, shall cause the goods to be replevied to him on his giving security either to commence in one of the Superior Courts an action of replevin against the distrainer within a week, and to prosecute such action with effect and without delay; or to commence and to prosecute such action within one month in the district County Court (ss. 64–66).

An action of replevin commenced in the County Court may be removed by the defendant by *certiorari* into a Superior Court upon his giving security to the Master to defend the action with effect, and (unless the replevisor shall discontinue, be non-prossed or nonsuited) to prove therein that the defendant had good ground for believing that *title* was in question, or that the rent or damage, in respect of which the distress was taken, exceeded £20 (sect. 67).

An appeal from the County Court to a Superior Court is allowed in all actions of replevin where the rent or damage exceeds the above amount (sect. 68).

The occasion for the present provision seems to be the recent decisions, which established conclusively that replevin lies in *any* case of goods unlawfully taken from the owner,—a proposition which (previously to the cases of *Mellor v. Leather*, 1 Ell. & Bl. 619; *Mennie v. Blake*, 25 L. J., Q. B. 399; and *George v. Chambers*, 11 Mee. & W. 149) was not universally recognized. (See also *Steph. Lush, Pr.* p. 793.)

Payment into Court in replevin.

XXIII. The plaintiff in replevin may, in answer to an avowry, pay money into Court in satisfaction in like manner and subject to the same proceedings, as to costs and otherwise, as upon a payment into Court by a defendant in other actions.

Before this provision the only *statutable* permission to pay

money into Court and to throw on the opposite party the risk of having to pay the costs of carrying the proceedings further, was that given by 3 & 4 Will. 4, c. 42, s. 21, as confirmed by the Common Law Procedure Act, 1852 (s. 70). But neither statute applies to the payment into Court by the *plaintiff* in replevin; the word "defendant" only being used. Therefore, though a *defendant* in replevin has been allowed to pay money into Court in respect of his trespass as in other actions (see *Lambert v. Hepworth*, 2 Q. B. 729), a *plaintiff* in replevin who had no defence to make to the claim of rent or charge of damage avowed by the defendant as a justification for the distress, could not, as a matter of course, obtain leave to pay money into Court in respect of the rent or damage, and then stop the proceedings, but was obliged to let the action take its course, and thereby increase the costs he would ultimately have to pay. Yet even before the Act of Will. 4 it was not unusual for the Court to stay the proceedings in replevin (where the distress was for *rent*) on the *special application* of the plaintiff, and on his paying into Court the costs already incurred and the rent avowed, or such portion of it as he admitted to be due. (See *Gregg's Case*, 2 Salk. 597; *Vernon v. Wynne*, 1 H. Bl. 24; *Hopkins v. Shrole*, 1 B. & P. 382.) It appears, however, that this course could not (at all events prior to that Act) be adopted where the defendant avowed for *damage feasant*. (See *Anon.* 8 Mod. 379.)

XXIV. Such payment into Court in replevin shall not, nor shall the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond. Effect of such payment.

See the forms of replevin bonds under 19 & 20 Vict. c. 108, given in Broom's Practice of the County Courts (2nd ed.), pp. 274, 275. In such a bond the distrainee (in the case of an action of replevin to be commenced in the Superior Court) binds himself, unless only in the case of the defendant's making default, to make proof to the Court that a question of title was involved, or that the sum in question was above 20*l*. These facts could only be proved by a trial, but the preceding section makes it *optional* with the plaintiff to proceed to a trial, and allows him instead to pay a sum of money into Court. Hence the necessity for the present section.

Action on Bond or for Detainer.

XXV. In any action brought upon a bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, with a Payment into Court in action on money bonds, and for detainer.

penalty, and in any action for detaining the goods of the plaintiff, it shall be lawful for the defendant, by leave of the Court or a judge, and upon such terms as they or he shall think fit, to pay into Court a sum of money to answer the claim of the plaintiff in respect of such bond in the former case, and in the latter case to the value of the goods alleged to be detained; and such payment into Court shall be made and pleaded in like manner and according to the provisions of "The Common Law Procedure Act, 1852;" and the like proceedings may be had and taken thereupon as to costs and otherwise.

It is to be observed, that as to actions on *bonds* the above provision (though the recommendation of the Commissioners was general, see *Introd.* p. 31) only applies to *money* bonds as distinct from such bonds as are within the statute of 8 & 9 Will. 3, c. 11; (see as to what bonds are and what are not within that Act, *Walcot v. Goulding*, 8 T. R. 126; *Willoughby v. Swinton*, 6 East, 550; *Hurst v. Jennings*, 5 B. & C. 650; *Welch v. Ireland*, 6 East, 613; *Murray v. Earl of Stair*, 2 B. & C. 82; *Smith v. Bond*, 10 Bing. 125;) for in actions on bonds under that statute, in which there are *assignments of breaches* by the plaintiff, there can be no payment into Court unless after judgment and before execution of the damages assessed in respect of those breaches. (See *Steph. Lush, Pr.* 715.) As to actions of *detinue*, see *Crossfield v. Such* (8 Exch. 159), from which it would appear that the present section is only declaratory of the law with regard to actions for detaining goods.

It will, however, be remarked, that *leave* must now be obtained before paying money into Court in actions on bonds or for detainer. In other actions (where it can be paid in at all) no such leave is required, unless in the case of there being more than one defendant in the action. (See *Steph. Lush, Pr.* 629.) As far, therefore, as *detinue* is concerned, the present provision is a restraining rather than an enabling enactment; for if *Crossfield v. Such* be law, a defendant in *detinue* might (under the Common Law Procedure Act, 1852) have paid money into Court without leave.

Real Actions.

Dower, writ of right of dower, and *quare impedit* abolished as real actions, and to be com-

XXVI. No writ of right of dower or writ of dower *unde nihil habet*, and no plaint for freebench or dower in the nature of any such writ, and no *quare impedit*, shall be brought after the commencement of this Act in any Court whatsoever; but where any such writ, action or plaint

would now lie, either in a Superior or in any other Court, an action may be commenced by writ of summons issuing out of the Court of Common Pleas in the same manner and form as the writ of summons in an ordinary action; and upon such writ shall be endorsed a notice that the plaintiff intends to declare in dower, or for freebench or in *quare impedit*, as the case may be.

menced by
writ of sum-
mons.

XXVII. The service of the writ, appearance of the defendant, proceedings in default of appearance, pleadings, judgment, execution, and all other proceedings and costs upon such writ, shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons; and the provisions of "The Common Law Procedure Act, 1852," and of "The Common Law Procedure Act, 1854," shall apply to the writ and pleadings and proceedings thereupon.

Writ and all
proceedings
thereupon,
to be same as
in ordinary
actions.

Abolition of Original Writs.] By 3 & 4 Will. 4, c. 27, the Act of the year 1833 for limiting actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto, it was among other things provided (sect. 36) that after that year none of the real and mixed actions therein specified, and "no other action real or mixed (except a writ of right of dower, or writ of *unde nihil habet*, or a *quare impedit*, or an ejectment), and no plaint in the nature of any such writ or action (except a plaint for freebench or dower), should be brought.

These actions of dower, right of dower and *quare impedit*, thus excepted, have always hitherto commenced by *original writ* sued out of the Petty Bag Office of Chancery. The action of *ejectment* commenced in the same manner, in theory (until the Common Law Procedure Act, 1852, which provided a new writ of ejectment), though, in practice, the original writ was never, in that action, sued out,—the actual proceedings commencing with the declaration. Henceforth there will be no action whatever commenced by original. It may be observed that *plaints* in the nature of real or mixed actions or writs were the method of commencing remedies for the recovery of land in inferior courts, and that *free bench* is the name under which dower is, by the customs of some manors claimable in the lord's court in respect of lands of copyhold tenure. (*Fitzherbert, Nat. Brev. 155 P.*)

Former Procedure in Real Actions.] With respect to the procedure in real actions, now abolished by the effect of the last

of these two sections, it is sufficient here to observe, that (unless where the Crown was the plaintiff in a *quare impedit*) the original writ was invariably made returnable into the Common Pleas; which Court has exclusive jurisdiction in any action to recover land, other than ejectment. The defendant (or *tenant* as he was called in a real action) was summoned to appear and defend his possession as soon as the writ was delivered to the sheriff, and on the return of the writ he was entitled to *cast an essoign*, that is, allege an excuse for not appearing, which led to an adjournment of the proceedings. In case of an ultimate non-appearance by the tenant, the demandant was entitled to judgment; though the manner of effecting this result by process, called (in dower) writs of "grand *cape*," and (in *quare impedit*) of "attachment," and "grand distress," was tedious and unsatisfactory. Upon appearance, however, by the tenant, the demandant declared (or, as it was called in dower, *counted*) as in other actions, and the pleadings thenceforward were the same as in personal actions before the Common Law Procedure Act, 1852. (As to the proceedings in dower, see a fuller description in *Williams v. Gwyn*, 2 Saund. by Wms. 43—45 a.)

Real Actions under the present Act.] As observed in the Introduction (p. 27), it is by no means clear to what extent, if any, the Common Law Procedure Act, 1852, applied to real actions. Nor perhaps is it now very material to decide the point, as there is no doubt, that, for the future at all events, all its provisions will extend to real actions so far as they are applicable, or, in the words of the 27th section of the present Act, "as nearly as may be." Yet it is apprehended, that the *law* of these actions is not intended to be affected by this change in the procedure. It is consequently still necessary to consider their peculiar incidents.

The writ of *right of dower*, then, lay only in the case where a widow claimed the recovery of the residue of her dower, part of it having been already received by her from the tenant. (*Booth on Real Actions*, p. 166.) It is scarcely necessary to add, that it is seldom, indeed, that occasion occurs to apply a remedy for such a special injury.

The writ of *dower unde nihil habet* lay where a widow claimed the specific recovery of her dower, no part of it having been yet assigned to her. (*Ibid.*) There is an action of this species reported as recently as the year 1850. (See *Watson dem. v. Watson, ten.*, 10 C. B. 3; see also *Garrard v. Tuck*, 8 Com. B. 230.)

The writ of *quare impedit* lay where the plaintiff claimed the recovery of a presentation to a benefice in his gift, in which presentation he had been disturbed by the defendant or defendants. This writ was in constant use to try disputed titles to advowsons. (See *Booth, ubi sup.* 223.)

It will be observed, that it is only under circumstances which would have justified the plaintiff in suing out one or other of the above writs, that the writ of summons may now be indorsed with a declaration of the intention of the plaintiff to declare in "dower" or "*quare impedit*;" and that the exclusive jurisdiction, in these matters of the Court of Common Pleas, is still retained.

Yet it is apprehended that, as before, if the Crown be a party to a *quare impedit*, the proceedings may be in either of the Courts at its pleasure.

There were several pleas in bar peculiar to these actions, which will probably be still used, the formal parts being adapted to the new procedure. Thus there is (in dower) the plea of *ne unques seisie que dower*; viz., that the demandant's husband was never seised of such an estate in the lands as could give the demandant a legal claim to dower. The plea of *ne unques accouple en loial matrimonie*; viz., that the demandant and her supposed husband were never joined in lawful matrimony. The plea that the husband is still living. The plea that the demandant eloped from her husband, and lived in adultery with another person. (See *Hetherington v. Graham*, 6 Bing. 135.) The plea of *tout temps prist*; viz., that from the death of the husband, the tenant has always been, and still is, ready to render the demandant her dower, and renders the same into the Court. (See *Watson, dem. v. Watson, ten.*, 10 C. B. 3.) So (in *quare impedit*) there is the general issue *ne disturba pas*; viz., a denial of the disturbance. The plea of *plenarty*; viz., that the church has been full for six calendar months before the commencement of the suit by virtue of the patron's presentation. And several others.

Again, there are some points with regard to *trial* in these actions which should be noticed.

In dower, if to a plea of *ne unques accouple* the demandant replies that she was married at such and such a place, this issue has been decided by the certificate of the bishop of the diocese. And to a plea of the husband being still alive, if she reply his death, the issue has been hitherto tried by *witnesses*, i. e. by the examination of witnesses by the Court itself without a jury. (See *Finch*, L. 423.) All other issues in dower have been triable by jury. (See *Roscoe on Real Actions*, pp. 222, 300.)

In *quare impedit*, also, there have hitherto been certain issues triable by "certificate,"—as the issue on the ability of the plaintiff's clerk and those which arise with regard to institution, deprivation, resignation and plenarty. (See *Roscoe, ubi sup.*, p. 503.)

It is apprehended that the present provisions are not intended to alter the mode of *trial* in real actions in these respects, but it is a question not free from doubt.

Lastly, it may be observed, that some little obscurity in the 26th section is introduced by the mention of *plaints*. The *sheriff's* County Court still appears theoretically to retain the same litigious jurisdiction with regard to dower, as it did before the establishment of district or statutable County Courts under 9 & 10 Vict. c. 95. And the same may be said with regard to a "court baron." But no resort is practically ever now had to either of these tribunals. Still, as their jurisdiction in these matters has not ever been before expressly taken away, it was perhaps proper to do so in the present enactment. (As to the jurisdiction of these Courts in real actions, which appears never to have embraced a *quare impedit*, see further in *Moseley on Inferior Courts*, pp. 101, 378, 401.)

The following may be useful forms in a real action under the new procedure.

1. *Writ of Summons in Dower, or Quare Impedit.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, To C. D. of —, in the county of —, greeting : We command you, that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of Common Pleas in an action at the suit of A. B. And take notice, that, in default of your so doing, the said A. B. may proceed therein to judgment and execution. Witness (*name of the Chief Justice of the Court of Common Pleas*) at Westminster, the — day of — (*day of issuing the writ*) in the year of our Lord —.

N.B.—This writ is to be served within six calendar months from the date thereof, or if renewed from the date of such renewal, including the day of such date, and not afterwards.

The following indorsements must be made on the writ :—

1. "This writ was issued by — (*plaintiff's attorney's name in full*) of — (*place of his abode in full; also if sued out as agent for an attorney in the country, here say 'as agent for —, of —,'*) attorney for the said P. A. [*Or if sued out by the plaintiff in person, 'This writ was issued in person by the plaintiff within named, who resides at —,' mentioning the city, town or parish, and also the name of the hamlet, street and number of the house of the plaintiff's residence, if any such there be.*] 2. Take notice, that the plaintiff intends to declare in dower (or for 'freebench,' *if the lands be claimable by the plaintiff, as widow, by the special custom of a manor.*) [*If the action be a 'quare impedit,' then say 'the plaintiff*

intends to declare in quare impedit.'] 3. (*After Service.*)
This writ was served by X. Y. on C. D., the defendant, on
— the — day of —, 18—.

(Signed.) X. Y."

2. *Count (or Declaration) in Dower.*

In the Common Pleas.

The — day of —, A.D. —.

(*Venue.*) A. B., by —, her attorney (*or* "in person")
claims against C. D. the third part of ten messuages, ten barns,
ten stables, four gardens, four orchards, two thousand acres of
pasture, and two thousand acres of other land, with the appur-
tenances, in the parish of —, in the county of —, as the
dower of the said plaintiff of the endowment of E. B. deceased,
heretofore her husband, whereof she hath nothing (*a*).

3. *Declaration in Quare Impedit.*

In the Common Pleas.

The — day of — A.D. 18—.

— } A. B., by — his attorney [*or* "in person"] sues H.,
to wit. } bishop of E., C. D., esquire, and E. F., clerk. For
that one P., now deceased, in his lifetime was seised of the
rectory of Z. in the county aforesaid, whereunto the advowson
of the rectory of the parish church of Z. aforesaid did and doth
belong in his demesne as of fee and right, and being so seised
thereof as aforesaid the said P. afterwards presented to the said
church, being vacant, one W. his clerk, who, on the presentation
of the said W., was admitted, instituted and inducted into the
same in time of peace in the time of our sovereign Lady the
now Queen of Great Britain and Ireland; and he the said P.
being so seised, and the advowson so belonging, afterwards died
so seised, upon whose death the said rectory, with the advowson
so belonging thereto, descended to the plaintiff as heir of the
said P., whereby the plaintiff became seised of the same in his
demesne as of fee and right; and being so seised, the said
church afterwards became vacant by the death of the said W.,
whereby it then and there belonged and now belongs to the
plaintiff to present a fit person to the said church so being
vacant as aforesaid. But the defendants will not permit him,
but unjustly hinder him: wherefore the plaintiff says that he
is injured and claims damages to the value of £—.

(*a*) See *Garrard v. Tuck*, 8 Com. B. 230.

4. *Pleas in Dower.*

In the Common Pleas.

The — day of — A.D. 18—.

C. D. } The defendant, by — his attorney [*or* “in person,”
 ats. }
 A. B. } *as the case may be*] says :—

Ne unques seisie, &c.] That the plaintiff’s husband, in his lifetime, was not, either on the day on which he married the plaintiff or ever after, seised of such estate in the messuages and tenements in the declaration mentioned, with the appurtenances, or of any part thereof, whereby he could endow the plaintiff thereof.

Ne unques accouple, &c.] That the plaintiff never was accoupled to the said E. B., deceased, in lawful matrimony.

Elopement and Adultery.] That the plaintiff in the lifetime of the said E. B., and while she was the wife of the said E. B., of her own accord, and without the licence or consent and against the will of the said E. B., eloped from and left him the said E. B., and afterwards continually lived in adultery with one Y., during the whole of the life of the said E. B.

Tout temps prist.] That from the death of the said E. B. the defendant hath been always ready and still is ready to render to the plaintiff her dower of the said tenements and premises, with the appurtenances, and renders the same here in Court to the plaintiff.

5. *Pleas in Quare Impedit.*

Disclaimer by Bishop.] And the defendant H., bishop of E., says, that the rectory and parish church of — is within his diocese of —, and that he hath nothing nor doth he claim to have anything in the rectory of the church aforesaid, or in the advowson of the same, except only the admission, institution and induction of the rectors to the same rectory and parish church, and all such other things as belong to the ordinary as ordinary of that place.

Simony by Plaintiff.] And the defendant H., bishop of E., says, that the said church of Z. is within his diocese of —, and a benefice with cure of souls ; and that, the said church having become vacant by the death of W. as aforesaid, afterwards and whilst the same continued vacant, and before the making of the presentation after mentioned, it was corruptly, simoniacally and unlawfully, and against the form of the statute, agreed between the plaintiff and one X. Y. that he, the plaintiff, should present the said X. Y., his clerk, &c., and that the

said X. Y. should in consideration thereof give his bond to the plaintiff in the penal sum of 3,000*l.*, conditioned at any time then after his admission upon the request of the plaintiff absolutely to resign the said rectory, so that the same might become vacant and the plaintiff be at liberty to present anew thereto. That the plaintiff afterwards, in pursuance of the said agreement, corruptly, simoniacally and unlawfully, and against the form of the statute as aforesaid, presented the said X. Y., his clerk, to the said defendant H., bishop of E., to be admitted, and the said X. Y. did also, in pursuance of that agreement, afterwards corruptly, simoniacally and unlawfully, and against the statute as aforesaid, give such bond, and the plaintiff corruptly and simoniacally accepted the same; by means of which premises the said presentation of the said X. Y. by the plaintiff became void in law, and the said defendant H., bishop of E., by reason thereof did not nor could admit the said X. Y. into the said church by virtue of that presentation.

Ne disturba pas.] And the defendant H., bishop of E., says that he has not hindered nor doth he now hinder the plaintiff from presenting to the said church.

Plenary, by Patron (a).] And the said defendant C. D. says, that the said church was full and still is of the defendant E. F. for the space of six months before the writ of summons herein was sued out, by virtue of the presentation of him the said C. D.

Attachment of Debts.

XXVIII. In proceedings to obtain an attachment of debts under "The Common Law Procedure Act, 1854," the judge may, in his discretion, refuse to interfere where, from the smallness of the amount to be recovered or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious.

Judge may refuse to interfere in proceedings to attach debts.

It is probable that a judge, under this provision, will refuse to interfere in those cases in which a stay of proceedings would be directed on the ground of their "frivolity," if an action were brought against the garnishee by his original creditor; (see *Steph. Lush, Pr.* p. 751); as for example, if the debt be under forty shillings and could be recovered in a county court. (See *Kennard v. Jones*, 4 T. R. 495; *Stutton v. Banent*, 3 Exch. 831.) The meaning of the words "amount to be recovered" in the above section, as distinct from the "debt sought to be attached," does not seem clear.

(a) If plenary be pleaded by the *clerk*, he must show a good title in the patron. See *Roscoe on Real Actions*, p. 234.

Proceedings where third person has a lien on the debt.

XXIX. Whenever in proceedings to obtain an attachment of debts under the Act above mentioned it is suggested by the garnishee that the debt sought to be attached belongs to some third person who has a lien or charge upon it, the judge may order such third person to appear before him and state the nature and particulars of his claim upon such debt.

The usage of the word "lien" here is popular and not technical. It properly applies only in respect of goods in the possession of a bailee—not in respect of a mere *chose en action*, such as a debt.

Judge may bar claim of third person, and make orders.

XXX. After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the judge may think fit to call before him, or in case of such third person not appearing before him upon such summons, the judge may order execution to issue to levy the amount due from such garnishee, or the judgment creditor to proceed against the garnishee, according to the provisions of "The Common Law Procedure Act, 1854," and he may bar the claim of such third person, or make such other order as he shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person and to costs as he shall think just and reasonable.

It is not easy to see in what cases the judge could, under this section, order the judgment creditor to proceed against the garnishee under the Common Law Procedure Act, 1854 (s. 64),—because that section applies only to a case where the garnishee *disputes his liability*, whereas by proceeding under the 29th section of the present Act he clearly admits his liability to pay the debt to some one. (See *Steph. Lush, Pr.* pp. 473—476.)

Provisions of 17 & 18 Vict. c. 125, to apply to orders.

XXXI. The provisions of "The Common Law Procedure Act, 1854," so far as they are applicable, shall apply to any order and the proceedings thereon made and taken in pursuance of the herein next before-mentioned powers under this Act.

It will be observed, that the general effect of the above four sections is, to extend to garnishees the protection afforded by way of *interpleader* proceedings.

[MISCELLANEOUS PROVISIONS.]

Costs of Writs of Injunction and of Mandamus.

XXXII. In all cases in which a writ of mandamus or of injunction is issued under the provisions of "The Common Law Procedure Act, 1854," such writ shall, unless otherwise ordered by the Court or a judge, in addition to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing and serving such writ; and payment of such costs may be enforced in the same manner as costs payable under a rule of court are now by law enforceable.

Costs of writs of mandamus and injunction may be included in writs.

No particular form of writ of *mandamus* was given by the Common Law Procedure Act, 1854; but by sect. 72 it was directed, generally, to be in the form of an ordinary writ of execution (except that it should be directed to the party instead of to the sheriff), and simply to command the defendant to *perform the duty* in question. (See *Steph. Lush, Pr.* p. 745.) An ordinary writ of execution says nothing about "costs," but directs the levy by the sheriff of the amount for which judgment has been recovered, and interest.

As to the writ of *injunction*, its existing form is given in Chitty's Practical Forms (7th ed.), p. 899. In case of either of these writs, an addition to the usual form must now be made, enjoining and commanding the defendant not only to do or desist, &c., as therein stated, but also "forthwith to pay to the plaintiff his costs of preparing, issuing and serving this writ." The amount of such costs may be endorsed on the writ as thus:—

"The plaintiff claims £—— for costs.

A. B. of ——, &c.

[or

E. F. of ——, &c.

Attorney for the plaintiff."]

It may be remarked that costs payable under a rule of Court are enforceable either by attachment or by an ordinary execution writ. (See 1 & 2 Vict. c. 110, s. 20.) The latter is the usual manner of proceeding. (See *Steph. Lush, Pr.* p. 703.)

Injunction against a Corporation.

XXXIII. Writs of injunction against a corporation may be enforced either by attachment against the directors or other officers thereof, as in the case of a mandamus, or by

Mode of enforcing writs of injunction against corporations.

writ of sequestration against their property and effects, to be issued in such form and tested and returnable in like manner as writs of execution, and to be proceeded upon and executed in like manner as writs of sequestration issuing out of the Court of Chancery.

With respect to enforcing a peremptory *mandamus* against a corporation aggregate, the law seems to be to the following effect.

Where the corporation at large have the power and duty to perform the act in question, the writ is directed against the corporation by its name of incorporation, and may be enforced by attachment against those members who actually, at a corporate meeting, voted against obeying the writ; or who, having been duly summoned, stayed away from such meeting without adequate excuse. (*Guildford v. Mills*, 2 Keb. 1; *Charitable Corporation v. Tutton*, 2 Atk. 405.)

But where the thing required is *solely* the duty, not of the corporation, but of one or more of its officers, the *mandamus* is directed accordingly, and in these cases (where there are more officers than one in fault) the law recognizes no right of voting among them; all are equally guilty and liable to be attached (*R. v. Chancellor, &c. of Cambridge*, 1 W. Bl. 549), and imprisoned and fined for the contempt. (*R. v. Mayor, &c. of Truro*, cited 1 H. Bl. 209.)

The other process mentioned in this section, *the writ of sequestration*, has hitherto been used only by the Court of Chancery,—except in the particular case of *nulla bona* having been returned by the sheriff to a *fi. fa.* against a beneficed clergyman, in which a sequestration against the ecclesiastical profits has always issued at common law, see 2 *Chit. Arch. Pr.* 10th ed. p. 1226; *Steph. Lush, Pr.* pp. 460, 461. This process has been resorted to in Equity for a variety of purposes, and among others, to punish a corporation when in contempt. (*Grant on Corp.* p. 289.)

A sequestration, in a Court of Equity, is obtained on *motion* only (*Dan. Pr.* 816), and under it is seised all the goods and chattels of the party in contempt, which can be got at without suit or action.

Doors may be broken open in executing the writ, as well as boxes and locked rooms. (*Pelham v. Duchess of Newcastle*, 3 Swanst. 290.) But nothing can be taken from the premises or sold without a special order (*Hales v. Shaftoe*, 1 Ves. jun. 86), as to obtaining which see *Mitchell v. Draper*, 9 Ves. 208. Moreover, under a sequestration, the *lands* and profits issuing therefrom of the defendant may be seized. (See *Dan. Pr. Chan.* 821.)

The word "directors," in the above clause, shows that the provision is intended to apply to "registered joint stock companies," as well as to corporations at Common Law.

Costs in frivolous Actions.

XXXIV. When the plaintiff in any action for an alleged wrong in any of the Superior Courts recovers by the verdict of a jury less than five pounds, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried or judgment passed by default, in case the judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought.

Costs not recoverable in actions for injury, and verdict less than 5*l.* if judge certifies.

This section is in extension of the 3 & 4 Vict. c. 24, s. 1 (which however is not expressly repealed or referred to), under which the plaintiff recovered no costs *unless* the judge certified to the effect specified in the concluding part of the present provision, if *less damages than forty shillings* were recovered. But that Statute is confined to actions of *trespass* or *case*, whereas the present provision is general, and applies to all actions for *wrongs*, that is, wrongs independent of contract. Hence the practice as to costs in "detinue" and "replevin" will be also governed by this new enactment. Actions arising out of *contracts*, on the other hand, will still be governed by the 43 *Eliz. c. 6, s. 2*; which allows no costs beyond the debt recovered if the defendant can obtain from the judge a certificate that the debt to be recovered did not amount to *forty shillings*.

It is to be remembered, however, that if the action ought to have been brought in the *County Court*, then the question of costs in the Superior Court (under any of these enactments) does not arise at all, as in that case the plaintiff gets no costs. (See 9 & 10 *Vict. c. 95*; 13 & 14 *Vict. c. 61*; 15 & 16 *Vict. c. 54, &c.*; see also *Powle v. Gandy*, 7 C. B. (N. S.) 556.)

It is observable, also, that the provisions contained in 3 & 4 *Vict. c. 24*, as to costs did not apply where the action was for trespass to land, &c. in respect of which notice not to trespass had been previously given by the owner on the de-

fendant. (Sect. 3 ; see *Steph. Lush, Pr.* p. 687.) The present provisions contain no similar qualification. (As to the *judge's certificate*, see *Sherwin v. Swindall*, 12 Mee. & W. 783 ; *Foster v. Pointer*, 8 Mee. & W. 783. As to the word "*immediately*," see *Thompson v. Gibson*, 8 Mee. & W. 281 ; *Jones v. Williams*, 13 Mee. & W. 420 ; *Leech v. Lamb*, 25 L. J., Exch. 17.)

Under the 3 & 4 Vict. c. 24, the plaintiff had to apply for the certificate ; the present provision throws this upon the *defendant*, as under the Statute of Elizabeth.

An incidental effect of the present enactment will be still further to reduce the importance of the technical divisions of actions, which since the Common Law Procedure Act, 1852, have chiefly come into discussion with regard to questions of costs.

Liability of Shipowners.

Enactment in
lieu of sect. 88
of 17 & 18
Vict. c. 125.

XXXV. The eighty-eighth section of "The Common Law Procedure Act, 1854," shall be and is hereby repealed, and from and after the passing of this Act the Superior Courts or any judge thereof may, upon summary application, by rule or order, exercise such and the like jurisdiction as may be exercised by the Court of Chancery under the provisions of the ninth part of "The Merchant Shipping Act, 1854."

The repealed section of 17 & 18 Vict. c. 125, professed to vest in the Courts of Law the same jurisdiction as *at the date of that Act* might be exercised by the Courts of Equity under 53 Geo. 3, c. 159. The statute last mentioned, however, had been repealed by 17 & 18 Vict. c. 104 (The "Merchant Shipping Act, 1854"), which passed earlier in the session of 1854. Hence the 88th section of 17 & 18 Vict. c. 125, s. 88, was in fact inoperative. As to the nature and objects of the jurisdiction given by 17 & 18 Vict. c. 104, s. 14, to the Court of Chancery, see the Introduction, p. 35.

Amendments.

Amendments.

XXXVI. It shall be lawful for the Superior Courts of Common Law, and every judge thereof, and any judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceedings under the provisions of this Act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party apply-

ing to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit, and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for.

This clause is the same as the answering provision in the Common Law Procedure Act, 1854 (s. 96), as to which, and the amendment clause of the Common Law Procedure Act, 1852 (s. 222), see *Steph. Lush, Pr.* pp. 390—397.

It may be here remarked, that since the Common Law Procedure Act, 1854, it has been intimated that the Court will not, in general, interfere with the decision of the judge at Nisi Prius in *refusing* an amendment, but that the proper course for a party aggrieved by such refusal is to make a substantive application to the Court to amend. (*Brennan v. Howard*, 1 Hurl. & N. 138.)

General Rules.

XXXVII. It shall be lawful for the judges of the said Courts, or any eight or more of them, of whom the chiefs of each of the said Courts shall be three, from time to time to make all such general rules and orders for the effectual execution of this Act and of the intention and object thereof, and for fixing the costs to be allowed for and in respect of the matters herein contained, and the performance thereof, as in their judgment shall be necessary or proper, and for that purpose to meet from time to time as occasion may require; provided that nothing herein contained shall be construed to restrain the authority or limit the jurisdiction of the said Courts or of the judges thereof to make rules or orders, or otherwise to regulate and dispose of the business therein.

General rules may be made by the judges.

Forms.

XXXVIII. Such new or altered writs and forms of proceedings may be issued, entered and taken as may by the judges of the said Courts, or any eight or more of them, of whom the chiefs of each of the said Courts shall be three, be deemed necessary or expedient for giving

New forms of writs and other proceedings.

effect to the provisions hereinbefore contained, and in such forms as the judges of such Courts respectively shall from time to time think fit to order; and such writs and proceedings shall be acted upon and enforced in such and the same manner as writs and proceedings of the said Courts are now acted upon and enforced, or as near thereto as the circumstances of the case will admit; and any existing writ or proceeding the form of which shall be in any manner altered in pursuance of this Act shall nevertheless be of the same force and virtue as if no alteration had been made therein, except as far as the effect thereof may be varied by this Act.

Interpretation of Terms.

Interpretation
of terms.

XXXIX. In the construction of this Act the word "Court" shall be understood to mean any one of the Superior Courts of Common Law at Westminster; and the word "judge" shall be understood to mean a judge or baron of any of the said Courts; and the word "master" shall be understood to mean a master of any of the said Courts; and the word "action" shall be understood to mean any action in any of the said Courts.

Palatinate Courts.

Provisions re-
lating to Su-
perior Courts
to apply to
Court of Com-
mon Pleas at
Lancaster and
Court of Pleas
at Durham.

XL. All the enactments and provisions of this Act shall extend and apply to the Court of Common Pleas at Lancaster and the Court of Pleas at Durham, and actions and proceedings therein respectively, subject to the following modifications: all the powers given by this Act to the judges of the said Superior Courts of Common Law at Westminster to make general rules and orders shall and may be exercised by the respective judges of the Court of Common Pleas at Lancaster and Court of Pleas at Durham, being judges of one of the said Common Law Courts at Westminster, or any two of them respectively, with respect to the said Court of Common Pleas at Lancaster and Court of Pleas at Durham respectively, and matters and proceed-

ings therein within the jurisdiction of the same Courts respectively; and all powers under this Act exercisable by any one judge of the Superior Courts at Westminster shall and may be exercisable by one judge of the said Superior Courts of the said counties palatine, being also a judge of one of the said Courts at Westminster, as to matters and proceedings in the said Superior Courts of the said counties palatine.

XLI. Provided always, that all the provisions of this Act applicable to masters of the said Courts at Westminster shall apply to the respective prothonotaries of the Court of Common Pleas at Durham and their respective deputies, who may singly exercise, with reference to matters and proceedings in the last-mentioned Courts respectively, the powers hereby given to any one or more of the masters of the Superior Courts at Westminster.

Provisions as to masters of Courts at Westminster to apply to prothonotaries of Palatinate Courts.

XLII. Provided also, as to proceedings in appeal, that the Court of Queen's Bench, being the Court of Error from the said Court of Common Pleas at Lancaster and Court of Pleas at Durham, shall also be the Court of Appeal from the said respective Courts for the purposes of this Act.

As to proceedings in appeal.

Commencement of Act.

XLIII. The provisions of this Act shall come into operation on the tenth day of October in the year of our Lord one thousand eight hundred and sixty.

Commencement of Act.

Inferior Courts of Record.

XLIV. It shall be lawful for her Majesty from time to time, by any order in council, to direct that all or any part of the provisions of this Act, or of the rules to be made in pursuance thereof, shall apply to all or any Court or Courts of Record in England and Wales, and within one month after such order shall have been made and published in the London Gazette such provisions and rules respectively shall extend and apply in manner directed by such order, and any such order may be in like manner from time to

Her majesty may direct all or part of this Act to extend to any Court of Record.

time altered and annulled; and in and by any such order her Majesty may direct by whom any powers or duties incident to the provisions applied under this Act shall and may be exercised with respect to matters in such Court or Courts, and may make any order or regulations which may be deemed requisite for carrying into operation in such Court or Courts the provisions so applied.

Short Title of Act.

Short title. XLV. In citing this Act in any instrument, document or proceeding it shall be sufficient to use the expression "The Common Law Procedure Act, 1860."

Extent of Act.

Extent of Act. XLVI. Nothing in this Act shall extend to Ireland or Scotland.

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